

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-1245
77-1246

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 77-1245, 77-1246

UNITED STATES OF AMERICA,

Appellee,

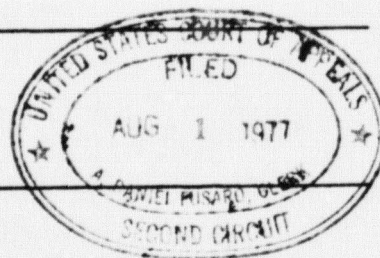
v.

VANKIRK MOORE and HAROLD BURNELL,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX



DAVID BLACKSTONE
401 Broadway
New York, New York 10013
226-6684

Attorney for Defendant-
Appellant Vankirk Moore

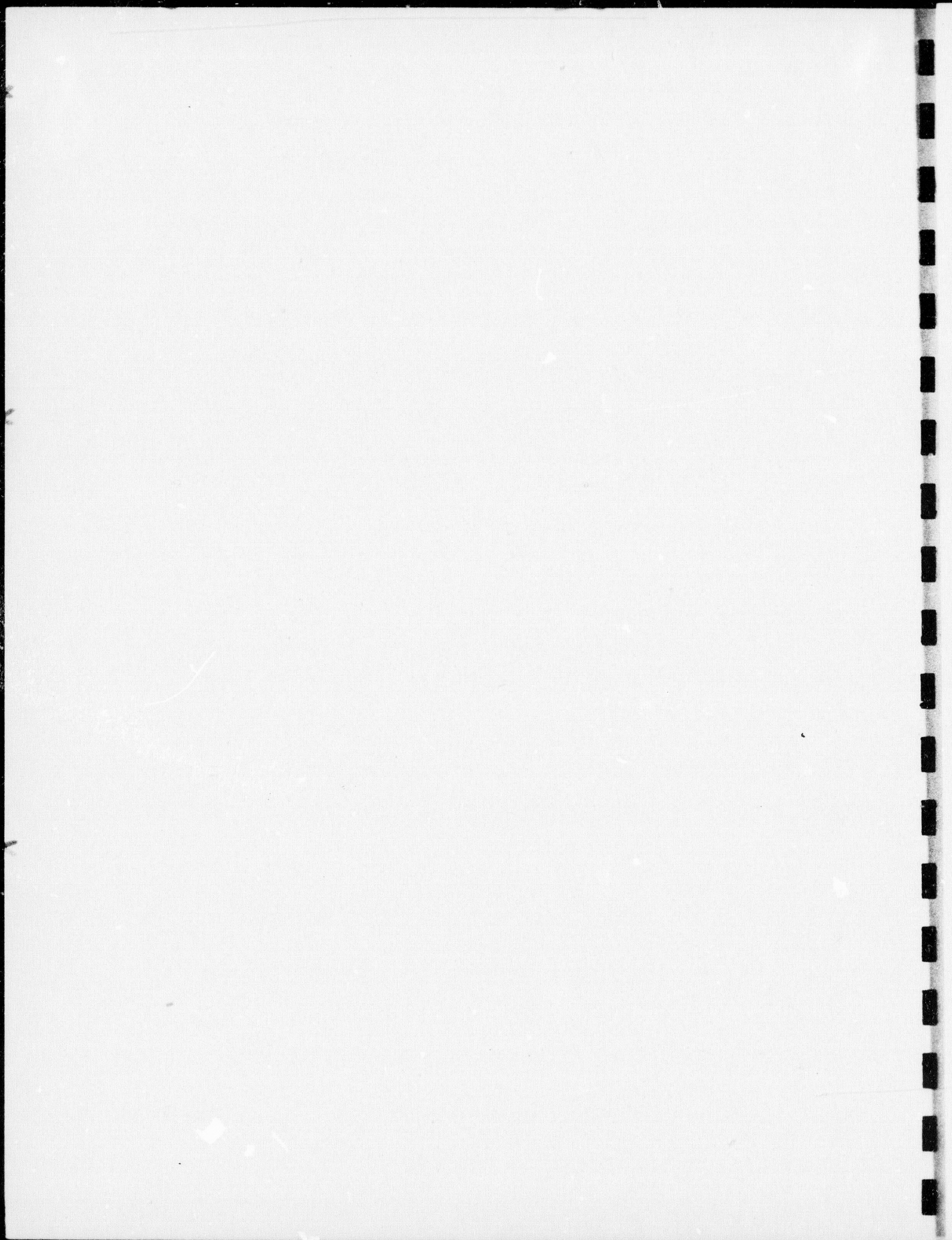
GUY MILLER STRUVE
1 Chase Manhattan Plaza
New York, New York 10005
HA 2-3400

Attorney for Defendant-
Appellant Harold Burnell

PAGINATION AS IN ORIGINAL COPY

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A1

CRIMINAL DOCKET

OFFENSE PO	JUDGE/MAGISTRATE Assigned	U.S.	BURNELL, HAROLD	Case Filed Mo. Day	76	1121	01
OFFENSE MO	0208 1 0866	vs.	a/k/a "Marion"	12 14			
SENIOR Mis	Disp./Sentence			No of Defs	* 02		
FELONY Fel	District Office	(LAST, FIRST, MIDDLE)		JUVENILE			

U.S. TITLE/SECTION	OFFENSES CHARGED	ORIGINAL COUNTS
18:1201(c)	Conspiracy to kidnap	1
18:1201(a)	Kidnapping	2
18:371	Conspiracy to commit extortion	3
18:875(a)	Extortion	4

4127

II. KEY DATES & INTERVALS

ARREST or	INDICTMENT	ARRAIGNMENT	TRIAL
U.S. Custody Began	High Risk Date	Information	Trial Set For
* 12/4/76	12-14-76	12-23-76	Voir Dire
Summons Served	Indict. Waived	1st Plea	Trial Began
First Appearance	In Charging District	12-23-76	2-22-77
	Superseding Indict/Info	Final Plea	Trial Ended
			3-11-77

MAGISTRATE

Search Warrant	Issued	DATE	INITIAL/NO.	INITIAL APPEARANCE DATE	INITIAL/NO.	OUTCOME
Summons	Issued			12/6/76	S.S.08AE	DISMISSED
Arrest Warrant Issued	Served			12/16/76		
COMPLAINT		12/6/76	S.S.08AE			
OFFENSE (In Complaint)		18 USC 1201 and 2 - KIDNAPING				

U.S. Attorney or Asst.

ATTORNEYS

Defense ☐ CJA ☐ Ret ☐ Waived ☐ Set ☐ None / Other ☐ P.D. ☐ C.D.

Eugene Neal Kaplan
791-1949

* Show last names and suffix numbers of other defendants on same indictment/information.

MOORE-02

DATE	(DOCUMENT NO.)	PROCEEDINGS	EXCLUDABLE DELAY
12/6/76		Complaint filed, Legal Aid assigned. Defendant remanded into the custody of U.S. Marshal in lieu of \$150,000 cash or surety.	
12/14/76		Indictment filed, 76 Cr. 1121.....Griesa, J.	
12-23-76		Deft. (atty. Roland Thau present) pleads not guilty. Deft. continued remanded in lieu of bail \$150,000 cash or surety. 10 days for motions. Case assigned to Broderick, J. for all purposes.....Carter, J.	
1-4-77		PRE-TRIAL CONFERENCE held. Trial 2-22-77. Bail on both defts reduced to \$100,000 . cash or surety. (Atty & Deft Pres).	3 1-4-77 E 1
1-5-77		Filed GOVT'S Notice of Readiness for trial.	
2-10-77		Filed One Large Brown Envelope containing Affidavit of Eugene Neal Kaplan dated 2-6-77 ordered sealed and impounded so ordered BRODERICK, J.	
2-16-77		Filed Govt's proposed examination of prospective jurors.	
2-17-77		Filed GOV't'S REQUESTS TO CHARGE.	

IV. PROCEEDINGS (continued)		PAGE TWO		V. EXCLUDABLE DELAY	
DATE	DOCUMENT NO.	Interval Section (a)	Start Date End Date (b)	LT Code (c)	OT Code (d)
2-22-77	Trial begun, with a jury as to this deft. (Atty Pres.				
2-23-77	Trial Cont'd.				
2-24-77	"				
2-25-77	"				
2-28-77	"				
3-3-77	"				
3-2-77	"				
3-3-77	"				
3-9-77	Filed ONE LARGE BROWN ENVELOPE Court's Ex'ts 1,2&3. ordered sealed and impounded and placed in vault. So ordered BRODERICK, J.				
3-10-77	Trial Cont'd Summations & charge.				
3-11-77	Trial cont'd. Jury deliberating. Jury find both of the defts <u>GUILTY</u> on each of counts 1,2,3,& 4. Pre-sentence invest. ordered. Sentence as to both defts on April 22, 1977 3:00 PM. Both defts remanded without bail. So ordered BRODERICK, J.				
3-21-77	Opened the Sealed Envelope filed on 3-9-77 to allow Ass't U.S. Atty. Kaplan to photo copy the 302's. Resealed immediately there after in accordance with the 3/9/77 order:				
4-6-77	Filed transcript of record of proceedings, dated Feb 21, 23, 24, 25, 28-77 (3-14-77)				
4-6-77	Filed transcript of record of proceedings, dated Mar 23, 24-77				
4-6-77	Filed transcript of record of proceedings, dated Mar 24-77				
4-13-77	Filed commitment order entered after, 4-13-77 Filed transcript of record of proceedings, dated Feb 24, 1977				
4-22-77	Filed JUDGMENT AND PROBATION/COMMITMENT ORDER - The deft is hereby committed to the custody of the Atty Gen for impr for a period of TEN (10) YEARS on count 1, LIFE on count 2, FIVE (5) YEARS on count 3, FIVE (5) YEARS on count 4. Sentence on each of counts 1,2,3 & 4 to run concurrently with each other. BRODERICK, J.all copies issued.				
4-27-77	Filed Deft's NOTICE OF APPEAL to the USCA from the Judgment of 4-22-77. Mailed Notices to US Atty and counsel for the deft.				
FINE AND RESTITUTION PAYMENTS					
DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

0866

MOORE, VANKIRK
- "a Tico"

12 14 / 76 1121 02

13:1201(c) Conspiracy to kidnap
 18:1201(a) Kidnapping
 18:371 Conspiracy to commit extortion
 18:875(a) Extortion

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BAIL - RELEASE	
☐ AMT	☐ Fugitive
☐ Denied	☐ Para. Record
☐ Set	☐ PSA
☐ Date	☐ 10% Deposit
☒ Bail Not Made	☐ Surety Bond
☐ Status Changed	☐ Collateral
☐ See Sec. 87	☐ 3rd Party Cust. Other
SENTENCE	
Disposition	3-11-77
☐ Convicted	☐ On Probation
☐ Acquitted	☐ On Parole
☐ Dismissed	☐ Work Release
On Government's Motion	

ARREST	ARREST	ARREST	ARREST	ARREST	ARREST
12/4/76	12-14-76	12-23-76	12-23-76	12-23-76	12-23-76
MAGISTRATE			MAGISTRATE		
12/6/76			12/6/76		
S.S.08AE			S.S.08AE		
18 USC 1201 and 2 - KIDNAPING			18 USC 1201 and 2 - KIDNAPING		
Eugene Neal Kaplan			Eugene Neal Kaplan		
791-1949			791-1949		

BURNELL -01

12/6/76 Complaint filed, Lawrence Hochheiser, 16 Court St., Bklyn, N.Y. assigned. Defendant remanded into the custody of U.S. Marshal in lieu of \$200,000 cash or surety

12/14/76 Indictment filed, 75 Cr. 1121.....Griesa, J.

12-23-76 Deft. (atty. Lawrence Hochheiser not present). Court directs a not guilty plea be entered. Deft. continued remanded in lieu of bail fixed at \$200,000 cash or surety. 10 days for motions. Case assigned to Broderick, J. for all purposes.Carter, J.

1-1-77 PRE-TRIAL CONFERENCE HOLD. Trial 2-22-77. Bail on both defts. Reduced to \$100,000 cash or surety. (Atty & Deft pres).

1-1-77 Filed Govt's Readiness for trial.

2-10-77 Filed One Large Brown Envelope containing Affidavit of Eugene Neal Kaplan dated 2-6-77 ordered sealed and impounded, so ordered BRODERICK, J.

2-16-77 Filed Govt's proposed examination of prospective jurors.

2-17-77 Filed Govt's REQUESTS TO CHARGE.

3 1-4-77 21

PROCEEDINGS

1-25-77
2-24-77
2-25-77
2-28-77
3-1-77
3-2-77
3-3-77
3-7-77
3-8-77
3-9-77
3-10-77
3-11-77

----- cont'd.

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Summations & charge

Trial cont'd. Jury deliberating. Jury find deft GUILTY on each on counts, 1,2,3 & 4. Pre Sent. Invest. ordered. Sentence as to this deft on 4-22-77 at 3:00P.M. Remanded without bail. so ordered, Broderick, J.

3-9-77 Filed ONE LARGE BROWN ENVELOPE Court's Ext's 1,2&3. ordered sealed and impounded and placed in vault. So ordered BRODERICK, J

3-21-77 Opened the Sealed Envelope filed on 3-9-77 to allow Ass't U.S. Atty Kaplan to photo copy the 302's. Resealed immediately there after in accordance with the 3-9-77 order.

Handwritten signature
Filed transcript of record of proceedings, dated 4-6-77

4-6-77 Filed transcript of record of proceedings, dated 4-6-77

4-6-77 Filed transcript of record of proceedings, dated 4-11-77

4-6-77 Filed transcript of record of proceedings, dated 4-11-77

4-13-77 Filed transcript of record of proceedings, dated 4-6-77

4-14-77 Deft w/a/p - Pre-trial Conference Held. BRODERICK, J.

4-25-77 Filed NOTICE OF APPEAL by the deft from the Judgment of 4-22-77. Mailed Notices to the Counsel for Appellant and U.S. Atty.

4-27-77 Filed ORDER - deft now at MCC be permitted to marry Jarsha Jones So ordered BRODERICK, J. copy to marshal.

4-22-77 Filed JUDGMENT AND PROBATION/COMMITMENT ORDER - the deft is hereby committed to the custody of the Atty Gen for impr for a period of TEN (10) YEARS on count 1, on count 2, FIVE (5) YEARS on count 3, FIVE (5) YEARS on count 4. Sentence on each of counts 1,2,3 & 4 to run concurrently with each other, So order BRODERICK, J. All copies issued.

5-3-77 Filed DEFT'S Request to charge.

5-2-77 Filed J & C (copy) with marshal's return 4-22-77 at MCC. Filed deft's temporary commitment. Bail set at the sum of \$200,000.

5-17-77 Filed Notice of Original Report Being Verified and Transmitted to the U.S. Atty.

5-16-77 Filed transcript of record of proceedings, dated 4-22-77

5-16-77 Filed transcript of record of proceedings, dated 4-22-77

7-5-77 Filed CJA 20 Appointment & voucher for counseling services. Copy #2 Filed transcript of testimony dated 1-4-77.

12-647

JUDGE BRODERICK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

76 CRIM

----- -x
UNITED STATES OF AMERICA :

- v - :

HAROLD BURNELL, a/k/a "Marion",
and VANKIRK MOORE, a/k/a "Tico", :

Defendants. :

INDICTMENT

76 Cr.

----- -x
COUNT ONE

The Grand Jury charges:

1. From on or about November 1, 1976, up to and including the date of the filing of this Indictment, in the Southern District of New York and elsewhere, HAROLD BURNELL, a/k/a "Marion", and VANKIRK MOORE, a/k/a "Tico", the defendants, and others to the Grand Jury unknown (referred to in this Indictment as "confederates"), unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other to violate Title 18, United States Code, Section 1201.

2. It was part of this conspiracy that HAROLD BURNELL, a/k/a "Marion", and VANKIRK MOORE, a/k/a "Tico", the defendants and their confederates unlawfully, wilfully and knowingly would seize, confine, inveigle, decoy, kidnap, abduct and carry away and hold for ransom and reward and otherwise a person, namely, Henry Huggins, a/k/a "Buster" Huggins, and would wilfully transport said person in interstate and foreign commerce.

MICROFILM

DEC 1

OVERT ACTS

In furtherance of this conspiracy and to effect its objects, the following overt acts were committed in the Southern District of New York and elsewhere:

1. On or about December 1, 1976, HAROLD BURNELL, a/k/a "Marion", and VANKIRK MOORE, a/k/a "Tico", the defendants, kidnapped Henry Huggins, a/k/a "Buster" Huggins, in New York City, New York.

2. On or about December 1, 1976, HAROLD BURNELL, a/k/a "Marion", and VANKIRK MOORE a/k/a "Tico", the defendants, caused Her r Huggins, a/k/a "Buster" Huggins to speak, by telephone from a public telephone in New York City, New York with Huggins' parents in South Carolina.

3. On or about December 3, 1976, HAROLD BURNELL, a/k/a "Marion", the defendant, had a telephone conversation with a person in the Bronx, New York and demanded the payment of ransom for the release of Henry Huggins, a/k/a "Buster" Huggins.

4. On or about December 3, 1976, VANKIRK MOORE, a/k/a "Tico", the defendant, had a telephone conversation with a person in the Bronx, New York and demanded the payment of ransom for the release of Henry Huggins, a/k/a "Buster" Huggins.

5. On or about December 4, 1976, HAROLD BURNELL, a/k/a "Marion", the defendant, had a telephone conversation with a person in the Bronx, New York arranging for the payment of ransom for the release of Henry Huggins, a/k/a "Buster" Huggins.

6. On or about December 4, 1976, VANKIRK MOORE, a/k/a "Tico", the defendant, had a telephone conversation with a person in the Bronx, New York arranging for the payment of ransom to the release of Henry Huggins, a/k/a "Buster" Huggins.

7. On December 4, 1976, HAROLD BURNELL, a/k/a "Marion", and VANKIRK MOORE, a/k/a "Tico", the defendants, were in a car located at the Korvette's shopping center on White Plains Road in the Bronx, New York.

(Title 18, United States Code, Section 1201(c).)

COUNT TWO

The Grand Jury further charges:

On or about December 1, 1976, in the Southern District of New York, HAROLD BURNELL, a/k/a "Marion", and VANKIRK MOORE, a/k/a "Tico", the defendants, unlawfully, wilfully and knowingly did seize, confine, inveigle, decoy, kidnap, abduct and carry away and hold for ransom and reward and otherwise a person, namely, Henry Huggins, a/k/a "Buster" Huggins, and did wilfully transport said person in interstate and foreign commerce.

(Title 18, United State Code, Sections 1201(a) and 2.)

COUNT THREE

The Grand Jury further charges:

1. From on or about November 1, 1976, up to and including the date of the filing of this Indictment, in the Southern District of New York and elsewhere, HAROLD BURNELL, a/k/a "Marion", and VANKIRK MOORE, a/k/a "Tico", the defendants, and their confederates unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other to commit certain offenses against the United States, to wit, to violate Title 18, United States Code, Sections 875(a) and 1952(a).

2. It was part of this conspiracy that HAROLD BURNELL, a/k/a "Marion", and VANKIRK MOORE, a/k/a "Tico", the defendants, and their confederates unlawfully, wilfully and knowingly would transmit in interstate commerce a communication containing a demand and request for a ransom and reward for the release of a kidnapped person, namely, Henry Huggins a/k/a "Buster" Huggins.

3. It was further part of this conspiracy that HAROLD BURNELL, a/k/a "Marion", and VANKIRK MOORE, a/k/a "Tico", the defendants, and their confederates unlawfully, wilfully and knowingly would use and cause to be used a facility in interstate commerce, with intent to promote, manage, establish and carry on and to facilitate the promotion, management, establishment and carrying on of an unlawful activity, to wit, extortion in violation of Title 18, United States Code, Section 875(a) and the laws of the State of New York, and thereafter would perform and attempt to perform acts to promote, manage, establish and carry on and to facilitate the promotion, management, establishment and carrying on of said unlawful activity.

Overt Acts

In furtherance of this conspiracy and to effect its objects, the following overt acts were committed in the Southern District of New York and elsewhere:

1 through 7. Overt Acts numbered One through Seven as set out in Count One of this Indictment, the allegations of which are incorporated in this Count by this reference, as Overt Acts numbered One through Seven of this Count.

8. On or about December 1, 1976, HAROLD BURNELL, a/k/a "Marion", and VANKIRK MOORE, a/k/a "Tico", the defendants and their confederates placed a telephone call from New York to South Carolina.

(Title 18, United States Code, Section 371.)

COUNT FOUR

The Grand Jury further charges:

On or about the 1st day of December, 1976, in the Southern District of New York, HAROLD BURNELL, a/k/a "Marion", and VANKIRK MOORE, a/k/a "Tico", the defendants, unlawfully, wilfully and knowingly did transmit in interstate commerce a communication, to wit, a telephone call from New York to South Carolina, containing a demand and request for a ransom and reward for the release of a kidnapped person, namely, Perry Huggins, a/k/a "Buster" Huggins.

(Title 18, United States Code, Sections 875(a) and 2.)

FORMLAW

ROBERT D. FISKE, JR.
United States Attorney

1971 Trial begins, with a jury on to both cliffs. (Clips + date present.)

1971 Trial cont'd

1971 Trial cont'd

1971 Trial cont'd

1971 Trial cont'd

1971 Trial cont'd

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12-667

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JUDGE FRODERICK

United States District Court
SOUTHERN DISTRICT OF NEW YORK
THE UNITED STATES OF AMERICA
vs.

HAPOLD BURHELL, a/k/a "Marion",
and VANKIRK MOORE, a/k/a "Tico",
Defendants.

INDICTMENT

76 Cr.

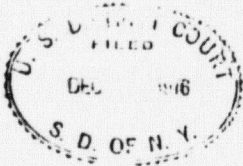
(Title 18, United States Code,
Sections 1201(a), 1201(c), 371
and 876(a))

ROBERT B. FISKE, JR.

United States Attorney.

A TRUE BILL

Foreman



12-23-76 Lett. Harold Burnett (atty.
David Mann) pleas not guilty.
Bail \$150,000.00, continued. Remanded.
Port. Vankirk Moore (Lawrence Hacking
atty. not present). Court directs a not
guilty plea be entered. Port. continued.
Remanded in lieu of bail set at \$200,000.00.
Ch. assigned Rodrick J. for
all purposes. 10 days for motions.
Carter J.

on 12-23-76. On that date, defendant held trial at 11:00 am
and on that date defendant paid \$10,000.00 cash
on bail. (atty. not present). Rodrick J.
JC

(out)

ALL

1 gtr10

2 M A R Y F R A N C E S B U R C H , called as
3 a witness by the government, being first duly
4 sworn, testified as follows:

5 DIRECT EXAMINATION

6 BY MR. KAPLAN:

7 Q Miss Burch, keep your voice up so we can hear
8 you in the back here.

9 How old are you?

10 A 22.

11 Q You will have to speak a little bit louder

12 A 22.

13 Q And where do you presently reside?

14 A Route 1, Box 65, Pageland, South Carolina.

15 Q Pageland, South Carolina?

16 A Yes.

17 Q And you live there with your family?

18 A Yes.

19 Q And prior to living in Pageland, South
20 Carolina, where did you live?

21 A 1816 Anthony Avenue.

22 Q Where is that?

23 A The Bronx.

24 Q And who did you live with?

25 A Harold Burnell.

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gtrll

Burch-direct

342

Q Louder, please.

A Harold Burnell.

Q And would you look around the courtroom and tell us if you see Harold Burnell anyplace?

A Yes.

Q Would you point him out for us?

A (Indicating).

MR. THAU: We will concede the identification, your Honor.

MR. KAPLAN: Thank you.

Q How long have you known Harold Burnell?

A Since '74.

Q And when did you start to live with him?

A July '76.

Q When you lived with him, it was sort of a common law relationship?

A Yes.

Q What they call a common-law relationship?

A Yes.

Q Now, do you know when you were living with Harold Burnell, do you know where he worked?

A Yes.

Q Where did he work?

A H&S Transmission.

1 gtrl2 Burch-direct 343

2 Q Do you know a man by the name of Tico

3 Moore?

4 A I know of him.

5 Q Would you look around the courtroom and

6 tell us if you see him anyplace.

7 A Yes.

8 Q Would you point him out for us?

9 A (Indicating) Sitting over there.

10 MR. HOCHHEISER: Indicating Mr. Moore.

11 MR. KAPLAN: Thank you.

12 Q For how long have you known Mr. Moore, known

13 of him?

14 A I met him in '74, also.

15 Q And was there a time when you lived with Mr.

16 Moore's parents?

17 A Yes.

18 Q And for how long did you do that?

19 A From '75 till '76.

20 Q From when in 1975 to when in 1976, if you

21 can be more exact.

22 A March '75 until July '76.

23 Q And in July 1976 you moved in with Mr. Burnell?

24 A Yes.

25 Q Did you ever meet a man named Buster Huggins?

gtr13

Burch-direct

344

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A Yes.

Q Let me show you Government's Exhibit 40
already in evidence, and ask you if you recognize this
photograph (handing).

A Yes.

Q And who is that a picture of?

A Buster.

Q Buster Huggins?

A Yes.

Q How did you come to meet Buster Huggins?

A At the garage.

Q Was he introduced to you by anyone?

A Yes.

Q Who?

A Harold.

Q Harold Burnell?

A Yes.

Q Now, you started living with Mr. Burnell
in July of 1976, is that correct?

A Yes.

Q And did there come a time when you went down
to South Carolina to be with your family?

A Yes.

Q When was that?

gtrl4

Burch-direct

345

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2 A September.

3 Q Do you remember when in September?

4 A Around the 27th.

5 Q Did anyone come down to South Carolina to meet
6 with you?

7 A Yes. I was there for about two weeks and
8 Harold came down.

9 Q And did there come a time when you returned
10 to New York City?

11 A Yes.

12 Q Did you return to New York City alone or with
13 someone else?

14 A Harold and I came back together.

15 Q About when was that?

16 A Around the first week of November, on a
17 Sunday.

18 MR. THAU: I'm sorry, I didn't hear that.

19 THE WITNESS: On a Sunday.

20 Q Before or after Election Day?

21 A After Election Day. The Sunday following,
22 after that. Around the 7th, I guess.

23 Q And for howlong did you stay -- when you got
24 back to New York City, did you resume living iwth Harold
25 Burnell?

1 gtr15
2 A Yes.

3 Q At 1818 Anthony Avenue?

4 A Yes.

5 Q And for how long did you stay in New York City?

6 A I was here until the 18th of November. My
7 grandfather died, so I went back down south.

8 Q During the time that you were in New York
9 City between the 7th of November and the 18th, did you
10 have a conversation with Harold Burnell concerning
11 Buster Huggins?

12 A Yes.

13 Q And would you tell us what he said to you and
14 what you said to him during that conversation?

15 MR. THAU: May we have a date, please?

16 Q Do you recall when in that ten-day period
17 this conversation occurred?

18 A No.

19 Q But it was sometime during the ten-day period?

20 A Yes.

21 Q You are sure of that?

22 A Yes.

23 Q Would you tell us what Mr. Burnell said to you
24 and what you said to Mr. Burnell?

25 A Harold said that Tico was planning to --

gtr16

Burch-direct

347

2 MR. HOCHHEISER: Objection, your Honor.

3 THE COURT: Overruled.

4 Q You may continue, Miss Burch.

5 A Planning to have Buster reipped off because
6 Buster had ripped off three Rastafarians.

7 Q Did you ask Mr. Burnell what "ripped off"
8 meant?

9 A No.

10 Q Did he tell you?

11 A No.

12 Q Was there anything else to the discussion?

13 A And that only three people knew about it,
14 him --

15 Q Him, Harold?

16 A Yes.

17 -- Tico and Kojak.

18 Q Who is Kojak?

19 MR.HOCHHEISER: I have an objection, your
20 Honor, to the reference to Tico.

21 THE COURT: Overruled.

22 Q Who is Kojak?

23 A A friend of theirs.

24 Q Was there any discussion about what they
25 would do once Buster was ripped off?

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MR. THAU: Objection to leading. Perhaps the witness might be asked to tell us all about what was said.

Q Will you tell us everything you remember about that conversation? -- at the beginning and go through it as best as I recall.

A Harold said that Tico was planning to have Buster ripped off because Buster had ripped off three Rastafarians and that only three of them knew about it, Tico, Kojak and Harold, and that --

MR. HOCHHEISER: Judge, I won't object to any further hearsay. I just have a standing objection to anything she claims Mr. Burnell said about Tico and then --

THE COURT: I take it that this is being offered subject to connection.

MR. KAPLAN: Correct, your Honor.

Q Miss Burch, would you continue, please.

A And that Kojak was messing around and that Tico was thinking of ripping him off, also, and that they would -- that Harold wouldn't have anything to do with it, that he would go to the garage to work every day just like he always did, and they would hold Buster for money because Buster had a lot of money, and that Tico was

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1 having someone take care of everything, that they would
2 probably take him out of states.

3 Q Was there anything else said about taking
4 Buster out of the states?

5 A They would probably take him out of the states
6 where he would never be found.

7 Q Where he would never be found?

8 A Yes.

9 Q Was there any discussion about how the money
10 would be divided?

11 A Just that they would divide the money, that's
12 all.

13 Q That Tico and Harold would divide the money?

14 MR. THAU: Objection to that. The witness
15 has never said that

16 THE COURT: Who would divide the money?

17 THE WITNESS: Harold just said that they
18 would divide the money.

19 Q He didn't say who "they" were?

20 A Not that I recall.

21 Q After you had this conversation with Harold
22 Burnell, you went back to South Carolina, is that right?

23 THE COURT: Just one second, please.

24 Ladies and gentlemen of the jury, the witness
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has just testified about a conversation which she had with Harold Burnell. That testimony referred to Mr. Moore.

It is being received by me subject to connection with respect to Mr. Moore, but it is hearsay so far as he is concerned because he was not there and it was not a conversation with him.

MR. KAPLAN: May I continue, your Honor?

THE COURT: Yes, sir.

Q After this conversation, you went back to South Carolina, is that correct?

A Yes.

Q And did you have any telephone conversations with Mr. Burnell after that?

A Yes.

Q What was the answer?

A You said did I have any telephone conversations --

Q Did you have any?

A Yes.

Q About how frequently?

A Almost every day.

Q Did you have a conversation with him on December 4, 1976, a Saturday?

A Yes.

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1 Q What did Mr. Burnell say to you and what did
2 you say to him?

3 MR. THAU: May we have a time, please?

4 MR. KAPLAN: The time of day?

5 MR. THAU: Yes.

6 Q What time of day was this conversation?

7 A I don't recall.

8 Q Morning or afternoon?

9 A Morning -- I don't recall exactly.

10 Q What did Mr. Burnell say to you and what
11 did you say to Mr. Burnell in this conversation?

12 A He was leaving that Saturday to come down
13 south and --

14 Q Did he tell you about when he would get
15 down to South Carolina?

16 A He should have reached there Sunday before
17 12.

18 Q Was there any conversation about anything
19 being brought to you?

20 A Excuse me?

21 Q Was any mention of something being brought
22 to you then?

23 A Something being brought to me?

24 MR. THAU: Your Honor, may we approach the
25

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2 bench on this?

3 THE COURT: Yes.

4 MR. KAPLAN: I will withdraw the question.

5 MR. THAU: All right.

6 Q Did Mr. Burnell tell you how he was going to
7 come down to South Carolina?

8 A He was going to drive the car.

9 Q By the way, what kind of a car did Mr. Burnell
10 have?

11 A A Buick Wildcat, '68.

12 Q Do you know what color it was?

13 A Brown.

14 Q Do you know what state it was registered in?

15 A South Carolina.

16 MR. KAPLAN: Your Honor, might I have a moment
17 to speak with Mr. Thau?

18 (Pause)

19 Q Did there come a time after that conversation
20 when you learned that Mr. Burnell had been arrested?

21 A Yes.

22 Q And as a result of conversations you had
23 with someone, did you return to New York City?

24 A I didn't hear the question.

25 Q As a result of conversations you had with someone,

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did you return to New York City?

A Yes.

(Continued on next page)

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Birch-direct

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2 Q When did you get back in New York City?

3 A On a Tuesday in December.

4 Q Tuesday, December 7th?

5 A I don't know the exact date.

6 Q Saturday was the 4th; Sunday was the 5th;

7 Monday was the 6th; Tuesday was the 7th; right?

8 A Yes.

9 Q And when did you see Harold Burnell for the

10 first time after arriving in New York City?

11 A Wednesday.

12 Q And did you have a conversation with Mr.

13 Burnell at that time?

14 A Yes.

15 Q Was someone else present in addition to Mr.

16 Burnell and yourself?

17 A Yes.

18 Q And who was that?

19 A Arthur Burnell.

20 Q Arthur Burnell?

21 A Yes.

22 Q Who is Arthur Burnell?

23 A Harold's brother.

24 Q And what did Mr. Burnell say to you and what

25 did you say to Mr. Burnell?

1 mpp2

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2 MR. THAU: Which Burnell are we talking about?

3 Q (Continuing) What did Harold Burnell say to
4 you and what did you say to Harold Burnell when you saw
5 him Wednesday?

6 A I just -- I asked him what happened, and he
7 said he went to Korvette's to pick up Copy Kat for the kids
8 for Christmas.

9 Q And what happened while he was at Korvette's?

10 A He was arrested there.

11 Q Now, on Thursday, December 9th, the next day,
12 did you go to the FBI office in New Rochelle?

13 A Yes.

14 Q And while you were at the FBI office, did you
15 hear certain tape recordings?

16 A Yes.

17 Q And after hearing those recordings, were you
18 able to recognize the voices on them?

19 A Yes.

20 Q And whose voice did you recognize?

21 A Harold's.

22 Q Did you go over to see Mr. Burnell the next
23 day?

24 A Yes.

25 Q And did you have a conversation with him at

1 mpp3 Birch-direct

2 that time?

3 A Yes.

4 Q What did Harold Burnell say to you and what
5 did you say to Harold Burnell on that occasion?

6 (Pause.)

7 MR. KAPLAN: Your Honor, perhaps we might have
8 a recess.

9 MR. THAU: Your Honor, may the record show
10 that the witness is weeping and leaning back against her
11 chair?

12 THE COURT: We will excuse the jury.

13 THE CLERK: Everyone please remain seated.
14 The jury is excused for a recess.

15 (The jury left the courtroom.)

16 MR. KAPLAN: Your Honor, since we are only
17 going until 3 o'clock, and it is a quarter to 12, perhaps
18 we could break for lunch, and that would give the witness
19 an opportunity to recover.

20 MR. THAU: Your Honor, I don't think it is
21 just a question of letting her recover. I think nature
22 should be allowed to take its course. I have never seen
23 a witness this young in such a state of decrepitude. She
24 should be taken care of.

25 THE COURT: The nurse is on her way.

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Birch-direct

2 Mr. Kaplan, it was our intention to go until 4
3 o'clock today, not 3.

4 MR. KAPLAN: I thought your Honor said 3, that
5 you had conferences.

6 THE COURT: Well, I am prepared to go until 4.
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2 (In the robing room; counsel present)

3 THE COURT: Gentlemen, I don't think we better
4 proceed with this witness today. I think she should be
5 checked by a doctor before she continues.

6 MR. KAPLAN: Your Honor, if I just might,
7 one of the main problems is that her grandmother is
8 ill in South Carolina and she has, every night that I
9 have spoken with her, which was every night that she has
10 been here, except last night, she has asked, "Can I go
11 back tonight? Can I go back tomorrow? I want to go
12 back to my grandmother. She has to go to the hospital.
13 I want to go back so I can be with her."

14 If we adjourn ⁵her testimony, that will cause
15 the weekend delay where she will be still under the
16 pressure of desiring to go back to her grandmother, and
17 the marshal told me just now that the marshal believes,
18 having sat with her for a number of days now, that that
19 is a large contributing factor into what has happened
20 this morning.

21 Certainly I am not with any medical
22 expertise to judge the medical^{necessities}ness of the situation, but
23 from an emotional standpoint I don't know if we might
24 not be doing her more harm by keeping her here over the
25 weekend so that she can see a doctor while she is so

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apprehensive about her grandmother in South Carolina.

Perhaps what we might do is recess now for lunch and have a doctor perhaps look at her down at BEekman or someplace over the luncheon recess and see where we are when we get back.

MR. THAU: Your Honor, perhaps rather than transporting her there, might there be a facility for bringing a doctor over here?

THE COURT: The nurse has suggested that there is a doctor over at --

MR. KAPLAN: 26 Federal Plaza?

THE COURT: At the jail.

I think we will adjourn then. I think we better make it until 2 o'clock.

MR. THAU: Your Honor, the logistics of it are sort of delicate.

Miss Burch is now in a terrible state right here in the courtroom and I would ask that when the jury is brought back, so that you might announce the early recess, Miss Burch not be present in that condition. I think it is inimicable --

MR. KAPLAN: She will be moved back to the robing room on the chair by the marshal.

THE COURT: Yes, it is my practice on any

1 gtr3

2 conferences to have them in the presence of the
3 defendant. The only reason I wanted to have this
4 here was because Miss Burch was in the courtroom and I
5 didn't want to have them in her presence.

6 MR. HOCHHEISER: I agree with the procedure.

7 MR. THAU: I do, too.

8 THE COURT: I think I will not bring the
9 jury back. I think I will tell the jury that
10 they are excused for lunch and they are to be back at
11 ten of two.

12 MR. KAPLAN: Very well, your Honor.

13 MR. THAU: Okay.

14 MR. KAPLAN: Thank you, your Honor.

15 (Luncheon recess)
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AFTERNOON SESSION
2:00 p.m.

(In open court in the absence of the jury)

THE COURT: Mr. Kaplan, do you have any word of the status of the witness?

MR. KAPLAN: Your Honor, Mr. Farkash just spoke with the marshal's office.

She has not as of about five minutes ago returned from Beekman. They were waiting either for word from someone at the hospital or for her imminent arrival back in this building.

Mr. Farksah informs me he instructed the marshals as soon as they have word or that she returned to call the courtroom. As yet, of course, we have not heard.

THE COURT: All right.

I would propose, then, that we proceed with another witness and resume with Mr. Burch when she returns if she is then able to.

MR. KAPLAN: That is agreeable with me, your Honor.

The next witness was told by me to be here at 2 o'clock and he should be here momentarily. Agent Graham is waiting for him out in the hall.

1 gtr2

2 As soon as he gets here he will let me know
3 and we can proceed.

4 THE COURT: All right.

5 Is that satisfactory with defense counsel?

6 MR. HOCHHEISER: I feel that that is a matter
7 which is appropriately within the Court's discretion
8 and, therefore, I take no position against the Court's
9 decision.

10 MR. THAU: I have no objection to it, your
11 Honor, given the condition of Miss Burch as I saw it an
12 hour and a half or so ago.

13 THE COURT: All right. Thank you.

14 (Pause)

15 MR. KAPLAN: Your Honor, if I might go on the
16 record for a second.

17 I have just spoken with Mr. Walsh, who is a
18 deputy United States Marshal.

19 Mr. Walsh informs me that Miss Burch is still
20 at Beekman Downtown Hospital, where she is still undergoing
21 some observation and testing and she has not returned to
22 the courthouse.

23 I am advised that my next witness has arrived,
24 so I think that we best proceed along the course your Honor
25 suggested.

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Burch-direct

2 (In open court; jury present)

3 M A R Y F R A N C E S B U R C H resumed.
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5 THE CLERK: Mary Burch, you are still under
6 oath.

7 THE COURT: Ladies and gentlemen of the
8 jury, we will now proceed with the direct examination of
9 Miss Burch.

10 Mr. Kaplan.

11 MR. KAPLAN: Thank you, your Honor.

12 DIRECT EXAMINATION

13 BY MR. KAPLAN:

14 Q Miss Burch, if at any time, either when
15 I am asking you questions or Mr. Thau or Mr. Hochheiser,
16 you feel a little faint or under the weather, let us
17 know as soon as you can.

18 All right?

19 Now, on Friday you told me that you went up
20 to the FBI office on the 9th of December. Do you remember
21 that?

22 A YES.

23 Q You will have to speak up.

24 A Yes.

25 Q And they played some tapes for you and you

1 gtr2 Burch-direct

2 recognized Harold Burnell's voice, is that right?

3 A Yes.

4 Q Then the next day, the 10th, did you go and
5 visit Mr. Burnell?

6 A Yes.

7 Q And did you have a conversation with him at
8 that time?

9 A Yes.

10 Q Would you tell us what Mr. Burnell, Harold
11 Burnell said to you, and what you said to Mr. Burnell
12 during that conversation?

13 A I told him that I was at the headquarters from
14 4:30 in the afternoon and I got home the next morning
15 about 2 o'clock and I was threatened when I was there --

16 MR. THAU: I am sorry, I can't hear you, Miss
17 Burch.

18 A I was threatened while I was there and
19 everything. I told him about this.

20 I told him that they played tapes for me
21 and everything and I told them what he had told me about
22 the ripping off of Buster and that I told them that it
23 was his voice on the tape.

24 Q What did Mr. Burnell say to you?

25 A He -- he said that I did what I thought

1 gtr3

Burch-direct

2 was right and, that I told him -- I told him what I
3 knew.

4 Q Did he say anything else to you?

5 A I don't recall.

6 Q Did he say anything to you about his voice
7 being on the tape?

8 MR. THAU: May the record show the witness
9 is shaking her head negatively.

10 THE COURT: The record will show that she
11 is shaking her head. Whether it was negatively or not,
12 I don't know.

13 Would you repeat the question, please.

14 MR. THAU: May your Honor --

15 THE COURT: Mr. Thau, please.

16 MR. THAU: Yes, your Honor.

17 Will you read the question.

18 (Record read)

19 THE COURT: Did he say anything, Miss Burch?

20 THE WITNESS: I don't recall.

21 Q Miss Burch, do you remember testifying
22 before the grand jury on December 13, 1976?

23 A Yes.

24 Q Do you remember being sworn by the foreman of
25 the grand jury to tell the truth?

1 gtr4 Burch-direct

2 A Yes.

3 Q Do you remember being warned that if you
4 did not tell the truth, you would be prosecuted for
5 perjury?

6 A Yes.

7 Q Do you remember being asked this question
8 and giving this answer --

9 MF. THAU: Page, please.

10 MR. KAPLAN: Page 52.

11 Q "Q You told him that you heard his voice
12 on the tape?

13 "A Yes."

14 Do you remember being asked that question
15 and giving that answer?

16 A Yes.

17 Q "Q What did he say in response to that?

18 "A If I remember correctly, he said -- he
19 asked me if I said that -- he asked me if I admitted, you
20 know --".

21 Do you remember being asked that question
22 and making that answer?

23 A Say it again, please?

24 Q "Q What did he say in response to that?

25 "A If I remember correctly, he said -- he asked

1 gtr5 Burch-direct

2 me if I said that -- he asked me if I admitted, you
3 know --

4 "Q That it was his voice?

5 "A Yes."

6 Do you remember being asked those questions
7 and giving those answers?

8 A Yes.

9 Q Do you remember being asked this question
10 and giving this answer:

11 "Q What did you tell him?

12 "A Because at first it sounded very heavy to
13 me. I told the agents it was heavy, and finally I told them
14 it was Harold's voice. I told him I admitted it was his
15 voice. He said the only involvement he had was the
16 voice."

17 Do you remember being asked that question and
18 giving that answer?

19 A Not all of that answer.

20 Q Miss Burch, let me show you Government's
21 Exhibit 3508E for identification, page 52 thereof, and
22 ask you to take a look at lines 12 through 16 (handing).

23 (Pause)

24 Q Having looked at Government's Exhibit 3508E,
25 does that refresh your recollection as to whether you

1 were asked that question and you made that answer?

2 A YES.

3 Q And were you asked that question and did you
4 give that answer?

5 A Yes.

6 Q Miss Burch, on Friday you also told us about
7 a conversation you had with Harold Burnell in November.

8 Do you remember that?

9 You told us about a conversation you had
10 with Harold Burnell in the beginning of November 1976,
11 between the 7th and the 18th.

12 Do you remember that?

13 A Yes.

14 Q Now, when you testified before the grand jury,
15 do you remember being asked this question and giving this
16 answer:

17 "Q Was there" --

18 MR. THAU: Page, please.

19 MR. KAPLAN: Page 50, line 16.

20 "Q Was there any talking about removing Buster
21 from the United States or from the State of New York?

22 "A I said, you know, like -- I said, why are
23 you going to do that, what are you going to do with
24 him? It didn't seem real, you know. So he said, you
25

1 gtr? Burch-direct 510

2 know, Tico would have somebody take him out of the
3 states, he would never be found. That's all he said."

4 Do you remember being asked that question
5 and making that answer?

6 A I said probably.

7 Q Miss Burch, let me show you, again, 3508E
8 for identification, page 50, and ask you to read the
9 question and answer starting on line 16 to yourself
10 (handing).

11 (Pause)

12 Q Did you read over that portion of the grand
13 jury transcript, Miss Burch?

14 A Yes.

15 Q Do you remember being asked that question
16 and making the answer as it appears on that paper?

17 A I still say --

18 MR. THAU: Your Honor, I would ask that lines
19 23 to 25 be included, else what was just read would be
20 out of context.

21 MR. KAPLAN: All right.

22 Q Did you read lines 23 to 25 as well?

23 A Yes.

24 Q Do you remember being asked those two questions
25

1 gtr8 Burch-direct 511
2 and giving those two answers to the grand jury?
3 A I said probably take him out of the states.
4 Q Is that what you said before the grand jury
5 or is that what you are saying now in court?
6 A That's what I thought I said before the grand
7 jury.
8 Q But it doesn't appear in that transcript,
9 does it?
10 A No.
11 Q You testified probably the other day, on
12 Friday.
13 Looking at that transcript, does it refresh
14 your recollection whether you said "probably" to the
15 grand jury?
16 MR. THAU: The question has been asked
17 three times, your Honor, I think, and answered three
18 times.
19 THE COURT: Well, listen to it this time.
20 Do you understand the question, Miss Burch?
21 THE WITNESS: Yes.
22 THE COURT: What is your answer?
23 THE WITNESS: I said probably.
24 Q Before the grand jury?
25 A To my best recollection, that's what I said.

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1 Q That is despite the fact that the word
2
3 "probably" does not appear in this transcript, is that
4 correct?

5 A Yes.

6 THE COURT: Mr. Kaplan, to this point there
7 has been an amendment made or an application made on the
8 series of questions and answers which are known to you,
9 to Mr. Thau and Mr. Kaplan, but notto the jury and not
10 to myself.

11 MR. KAPLAN: Your Honor, the questions and
12 answers come from Miss Burch's grand jury testimony.
13 She indicated that.

14 THE COURT: Yes.

15 MR. HOCHHEISER: He wants you to read the other
16 two questions.

17 THE COURT: Yes. Mr. Thau asked that the
18 question be --

19 MR. KAPLAN: I am sorry, your Honor, I
20 missed your question.

21 I will read that.

22 "Q Take him out of the states meaning Buster
23 Huggins outof the United States, is that correct?

24 "A That's my interpretation. I didn't question
25 him."

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Burch-direct

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Do you remember being asked that question
and giving that answer?

A Yes.

MR. KAPLAN: Your Honor, might I have a
moment to speak with counsel?

(Pause)

MR. KAPLAN: Your Honor, might we approach
the side bar?

(At the side bar)

MR. KAPLAN: Your Honor, on Friday, Miss
Burch indicated that they were going to divide the money,
but she did not know to whom or how.

In the grand jury she testified,

"Q Did he ever tell you how much money he was
supposed to get out of these dealings with Tico?

"A You mean the kidnapping?

"Q The kidnapping.

"A He said they would split it in half, I guess."

What I propose to do is to read those
questions to the witness and to get her answer to them.

I asked Mr. Thau if he would permit me to,
where he says he used the words Harold Burnell
because clearly in the context of the grand jury trans-
cript we were talking about Harold Burnell. Mr. Thau does

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Burch-direct

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not want me to do that.

MR. THAU: One second. You misunderstood.

I have no objection to the question, and Mr. Kaplan seems to be intent on posing this question to disprove a prior inconsistency which he alleges he made Friday or which he alleges he made Friday.

On Friday she says the money would be split.

MR. KAPLAN: Would be divided.

MR. THAU: Okay.

Now all he wants to add, the only difference would be to divide it in half.

To amplify half is not to show a prior inconsistency.

THE COURT: Will you stipulate that divided means to split in half.

MR. THAU: No, I am not going to stipulate to that.

THE COURT: I think he is entitled to examine.

MR. HOCHHEISER: Can't you just ask her what the division was?

MR. KAPLAN: Yes. But she says it was just going to be divided.

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1 gtrl2
2 MR. THAU: Why don't you ask her straight
3 out.

4 MR. KAPLAN: If she doesn't know, I will
5 use the grand jury testimony.

6 MR. THAU: That is all right.

7 MR. HOCHHEISER: I have another objection,
8 and that is this question and the last question involve
9 answers by the witness or involve a reading of her
10 grand jury answers that incriminate my client, and in the
11 previous question that was asked along those lines and
12 in this one she is saying -- in the previous question
13 she says that she thought it was probably and it was her
14 interpretation, and in this one she says divided in half
15 meaning with my client and then she says, "I guess."

16 Now, it is bad enough that I am getting a
17 hearsay statement incriminating my client, but when I
18 am --

19 MR. KAPLAN: It is not hearsay, it is sworn
20 grand jury testimony.

21 MR. HOCHHEISER: No, no. But it is
22 hearsay information from Burnell to her.

23 Then on top of being hearsay and not subject
24 to cross-examination and not said by Burnell under oath,
25 it is not what Burnell says but it is what she guesses

gtrl3

he said or interprets to what it means. I think there has to be a limit.

MR. KAPLAN: That is not true.

The following question is:

"They would split the money?"

"A Yes: The half came in where, like -- where they had an account together, Tico and Harold, because -- you know about the marijuana, the accounts would be in half, that's where the half came in."

I didn't want to bring in that they had an account when they were dealing with marijuana, but if you gentlemen want me to read that question and answer to the witness, I will be more than happy to do so.

MR. HOCHHEISER: That is her basis for the speculation she is making. She never said Burnell said that, she is giving a speculative incriminating statement about my fellow which, if it weren't speculation, would be hearsay, and it is speculation on top of that.

MR. KAPLAN: Your Honor, I withdraw all of those questions and, instead, go to page 55, starting at lines 20 to 25:

"Q Harold Burnell was supposed to get half of the proceeds that were realized from the ransom that was

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Burch-direct

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2 paid, is that correct?

3 "A I think he said half, yes.

4 "Q And Tico was supposed to get the other half?

5 "A Yes."

6 MR. HOCHHEISER: She thinks.

7 MR. KAPLAN: Those are emphatic.

8 MR. HOCHHEISER: What is so emphatic about
9 that?

10 MR. THAU: This is nothing but a repetition
11 of what we covered a moment ago which you took up and then
12 put in the form of an affirmative statement to which she
13 said, "Yes, I think," which is a typical way of
14 presenting evidence to a grand jury.

15 MR. HOCHHEISER: Yes. It is leading and
16 suggestive.

17 MR. THAU: And how.

18 First she is uncertain and you make her
19 certain by putting the words in her mouth before the
20 grand jury.

21 MR. HOCHHEISER: She is, in effect, saying,
22 "I'll go along with it, okay, but don't forget I told
23 you I wasn't sure."

24 MR. KAPLAN: They can cross-examine her about
25 that statement.

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2 MR. THAU: Your Honor, in any event, I
3 think all this business about the precise division of
4 fees as between senior partners, junior partners,
5 equal partners is truly irrelevant to the issues here.

6 MR. KAPLAN: You can argue that in summation,
7 Mr. Thau.

8 MR. THAU: This is not a Wall Street
9 law firm which partners are arguing over fees.

10 THE COURT: Mr. Kaplan, I don't quite
11 understand what you are doing right now.

12 You are not offering the grand jury testimony
13 as a statement --

14 MR. KAPLAN: I am offering the grand jury
15 testim only as substantive evidence, prior inconsistent
16 statements given under oath under Rule 801.

17 THE COURT: You haven't made such a
18 proffer and you have been using it to examine the
19 witness and she has testified that she testified in that
20 wise.

21 Now, you are leaving it that way and you are
22 taking a position that that satisfies the requirements
23 with respect to offering a prior statement under oath?

24 MR. KAPLAN: That's correct. She testified
25 that she was under oath and then I asked her the questions.

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Burch-direct

519

1
2 I asked her if the question was given and she made the
3 answer and she acknowledges she did.

4 In one case she said, "No, I told them
5 probably," and I intend to call the grand jury reporter
6 who will testify that she did not say "probably" before
7 the grand jury.

8 MR. HOCHHEISER: Did you speak to him
9 first?

10 MR. KAPLAN: Yes.

11 MR. HOCHHEISER: Okay.

12 MR. THAU: Your Honor, if the government
13 proposes to offer part of hre grand jury testimony as
14 evidence in chief, in that event, we have the same
15 objections as we would have with these very questions
16 to be asked here in court.

17 If he cannot lead in court, certainly it
18 won't make any sense that he be permitted to put in her
19 evidence which was being led before the grand jury.

20 You can't put in something inadmissible
21 if it took place in court simply because it took place
22 before a grand jury.

23 MR. HOCHHEISER: You know, I think that
24 argument is really well taken.

25 MR. KAPLAN: By you at least.

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Burch-direct

520

1 MR. HOCHHEISER: Yes.

2 No.

3 MR. THAU: No. I concur with him.

4 MR. KAPLAN: You made the argument.

5 MR. HOCHHEISER: I think it has a lot of
6 merit. It is obvious.

7 MR. KAPLAN: First of all, they weren't
8 leading questions, the ones I asked.

9 MR. THAU: Which ones, the last ones you
10 read?

11 THE COURT: The original question that you
12 came up here with Mr. Thau has indicated he has no
13 objection to.

14 MR. KAPLAN: The questions on page 54.

15 THE COURT: I don't want to overstate Mr.
16 Thau's position.

17 He says that he has no objection to using
18 Howard Burnell instead of "he," is that correct?

19 MR. THAU: Yes. But I object to the
20 question to begin with.

21 THE COURT: You have an objection to it.

22 MR. THAU: In other words, were your
23 Honor to rule that that evidence goes in, I have no
24 objection to Carol Burnell being substituted for "he."

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Burch-direct

521

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2 THE COURT: I do so rule and confine
3 yourself to that.

4 MR. KAPLAN: Those two questions and
5 answers?

6 THE COURT: Yes.

7 MR. KAPLAN: Thank you, your Honor.

8 (In open court)

9 DIRECT EXAMINATION CONTINUED

10 BY MR. KAPLAN:

11 Q Miss Burch, do you remember when you testified
12 before the grand jury being asked these two questions and
13 giving these two answers:

14 Page 54, lines 10 through 14.

15 "Q Did Harold Burnell ever tell you how much
16 money he was supposed to get out of this, these dealings
17 with Tico?

18 "A You mean the kidnapping?

19 "Q The kidnapping.

20 "A He said they would split it in half, I
21 guess."

22 Do you remember being asked those questions
23 and giving those answers to the grand jury?

24 A Yes.

25 Q Miss Burch, what I would like to do now is to

gtr19

Burch-direct

522

1 play some tape recordings for you, and after the tapes
2 are played for you I will ask you if you recognize the
3 voice of the man speaking on the phone.
4

5 Do you understand that?

6 A Yes.

7 MR. THAU: May I ask whether those are tapes
8 other than the ones played Friday?

9 MR. KAPLAN: I didn't play tapes Friday.

10 MR. THAU: I am sorry, I misremembered.

11 MR. KAPLAN: Your Honor, I am first going
12 to play from Government's Exhibit 1 in evidence the
13 first telephone call of hearing on that recording.

14 THE COURT: Mr. Kaplan, will you play
15 it over on the desk in front of the witness box so
16 that the witness can hear it?

17 MR. KAPLAN: Yes, your Honor.

18 (A portion of Government's Exhibit No. 1 was
19 played)

20 Q Miss Burch, having heard the first call on
21 Government's Exhibit 1, do you recognize the voice of the
22 man speaking on that tape recording?

23 A Yes.

24 Q And whose voice is that?

25 A Harold's.

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Burch-direct

523

2 Q Harold Burnell?

3 A Yes.

4 (Continued on next page)

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Q Miss Birch, I am now going to play for you the first call which appears on Government's Exhibit 2 in evidence, and after listening to that call, I will ask you if you recognize the voice of the caller?

(Tape was played.)

Q (Continuing) Miss Birch, having listened to the first conversation on Government's Exhibit 2 in evidence, are you able to recognize the male voice appearing in that conversation?

A Yes.

Q And whose voice is that?

A Harold's.

Q Harold Burnell?

A Yes.

Q Miss Birch, I am now going to play for you the fourth call which appears on Government's Exhibit 2 in evidence, and when that call is concluded I will ask you if you recognize the voice of the male caller appearing in it?

(Tape was played.)

Q (Continuing) Miss Birch, having heard the fourth conversation which appears on Government's Exhibit 2 in evidence, do you recognize the voice of the male caller appearing on it?

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Birch-direct

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A Yes.

Q And whose voice is that?

A Harold's.

Q Harold Burnell?

A Yes.

Q Now, Miss Birch, did there come a time in February when you returned to South Carolina?

A Yes.

Q And when was that?

A I think it was around the 5th, 4th or 5th.

Q And on the day that you returned to South Carolina, did you receive a telephone call?

MR. THAU: Your Honor, may we approach the bench on this?

(At the side bar.)

MR. THAU: Your Honor, I suppose Mr. Kaplan is going to elicit a threatening telephone call, to which he alludes in his affidavit to have this witness held as a material witness?

Now, I think that is prejudicial. I spoke to this witness -- you recall you gave me an opportunity to -- and she told me how she received a call; she didn't know from whom nor whether it was at the instance of anyone in particular, and I would ask that it not be permitted.

1 mpp3 Birch-direct

2 It is unduly inflammatory and has no relevancy to anything
3 that happened before.

4 MR. KAPLAN: Let me say this: she got a phone
5 call, and she was threatened. She was told, "If you
6 come back to New York, you and your family will be in
7 danger."

8 We offer that to show the witness's state of
9 mind.

10 The grand jury testimony shows fear on the
11 part of the witness. We offer it simply on the state of
12 mind of this witness in testifying before this jury.

13 MR. HOCHHEISER: I would say, your Honor,
14 that most of the courts which have considered this question
15 usually consider it when defense counsel through questions or
16 answers have elicited evidence implying that there is some
17 other reason for the witness to be not candid and putting
18 forth what kind of defense position opens the door to have
19 the kind of prejudice that we are potentially involved with
20 here by having the real reason coming out, but I have never
21 really seen such an application made absent the opening
22 of a door by defense counsel, when the witness can in no
23 way say that my client or Mr. Thau's client was responsible
24 for that phone call.

25 THE COURT: I will sustain the objection.

mpp4

Birch-direct

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(In open court.)

MR. KAPLAN: Your Honor, may I have a moment?

(Pause.)

MR. KAPLAN: Your Honor, might I pass up a decision briefly?

THE -COURT: You may, yes.

(Pause.)

THE COURT: I adhere to my ruling.

MR. KAPLAN: Thank you, your Honor.

No further questions.

THE COURT: Mr. Thau?

MR. THAU: Thank you, your Honor.

CROSS EXAMINATION

BY MR. THAU:

Q Miss Birch, have you a history of indisposition such as we saw Friday, or was it just Friday?

A I have had it before.

Q You have had it before?

A Yes.

Q Have you had medical attention for it?

A Yes.

Q How long have you been under medical care for that?

A Since '74.

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Birch-cross

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Q Do you take medicine for it?

A Yes.

Q How often?

A At one time I was on medication every six hours ever day for a three-month period. Then I was on it when I got the pain.

Q What kind of medication?

A At one time I was on Emperin, with a half-grain of Codein.

Q Codein, you say?

A Yes. Then I was on Enderin, 10 milligrams, and Phenobarbital, No. 3.

Q These are drugs for which you have a prescription?

A Yes.

Q And are you currently under medical care?

A Yes.

Q Are you presently under medical care?

A Yes.

Q When did you last receive medication?

A Saturday.

Q When had you last received medication before the testimony you gave Friday?

A I went to the doctor the 30th of November to get

mpp6

Birch-cross

529

renewed the prescription for my medication while I was down South.

Q And were you taking that medication daily or at what interval?

A Every six hours.

Q Miss Birch, when is the first time you saw and spoke to an FBI agent in connection with this case?

A Sunday.

Q I am sorry?

A On a Sunday.

Q December 5th?

A December following the Saturday Harold was arrested.

MR. THAU: May it be stipulated that it was the 5th of December?

MR. KAPLAN: Yes. I will so stipulate.

Q And you saw the agent in South Carolina where you had gone to attend your grandmother?

A My grandfather's funeral.

Q Now, when the FBI agent spoke to you, did you already know that the day before Harold Burnell had been arrested?

A Repeat the question, please?

Q Yes. When you saw the FBI agent on Sunday,

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Birch-cross

530

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2 December the 5th, did you already know that Harold Burnell
3 had been arrested the day before?

4 A No.

5 Q The FBI agent told you?

6 A Yes.

7 Q Did the FBI agent tell you on what charges
8 Harold Burnell had been arrested?

9 A Yes.

10 Q He told you basically, kidnapping?

11 A Yes.

12 Q And did the FBI agent tell you that he had
13 information that you were his girl friend or common-law
14 wife and that he was interested in knowing what you knew
15 about this case? Is that right?

16 A No. He didn't explain it to me like that.

17 Q Well, did he tell you at all what he wanted
18 to know from you?

19 A He told me that he was looking for Harold's
20 girl friend, answering by the name of Baby, because she
21 was last seen with Buster. That's what he told me.

22 Q Baby was last seen with Buster?

23 A Yes.

24 Q So do I understand it that the FBI thought
25 that you were Baby?

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Birch-cross

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A Yes.

Q And in fact you told him that you weren't; is that right?

A Yes.

Q Do I take it that the FBI agents continued to speak to you when they found out you weren't Baby, or did they just leave when they found out who you were?

A No. They continued questioning me.

Q And they continued questioning you in the area of thinking you knew about a plan to kidnap Buster Huggins; am I right?

A Yes.

Q How many agents were there?

A It was three of them. I don't know if all three were agents or not. It was three men.

Q Did they tape-record your interview, if you recall?

MR. KAPLAN: If she knows.

A I don't know.

Q Were they making notes as they were speaking to you?

A Yes; I think so.

Q Did they ask you to make out a statement, to write out a statement?

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Birch-cross

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1 mpp9
2 A Not that I recall. The only thing, they were
3 trying -- they wanted someone to testify that I was --
4 that I had been there the period of time that I had told
5 them I had been there.

6 THE COURT: By "there," you mean in South
7 Carolina?

8 MR. THAU: North Carolina.

9 THE WITNESS: South.

10 MR. THAU: I am sorry.

11 A (Continuing) No one was home but me, so the
12 only thing I had was my airline ticket, so he looked at
13 that.

14 Q Were they questioning you only in the area of
15 whether you had been in South Carolina a while or were
16 they questioning you as well on your acquaintance of Harold
17 Burnell and what you knew of him and his doings?

18 MR. THAU: Let me withdraw that and make it
19 simpler.

20 Q They asked you questions about Harold Burnell?

21 A Yes.

22 Q How long you had known him; right?

23 A Yes.

24 Q Whether you had ever lived together?

25 A Yes.

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Birch-cross

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Q And they asked you, didn't they, if you knew anything about Harold being involved in a plan to do Buster Huggins in?

A Yes.

Q Now, about how long did this interview last?

A I don't recall the exact time.

Q And did you speak frankly to them in your answers?

A What do you mean?

Q Well, did you answer truthfully the questions the FBI agents were asking you?

A Not all of them, no.

Q Isn't it so that on your interview of December 5th you denied any knowledge that Harold Burnell was involved in any plan to kidnap Buster Huggins or anyone else?

A I don't understand the question.

Q Did the FBI agents ask you in words or something like this:

"Do you know anything about Harold planning to kidnap Buster?"

-- things of that general nature.

A Yes. They asked me my opinion.

Q And what did you tell them?

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Birch-cross

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A I knew, but I didn't tell them.

Q I asked you what you told them, Miss Birch.

A No.

Q You told them that you knew of no such plan;
right?

A Right.

Q All right. And on December 5th, you didn't
tell them anything, did you, about a November conversation?

A No.

Q On December 5th, were you permitted to listen
to certain tapes?

A No.

Q When is the second time you spoke to an FBI
agent?

A That Sunday night.

Q Up in New York?

A No.

Q Again in South Carolina?

A Yes.

Q They spoke to you twice?

A They called me.

Q And on that occasion, what did they want from
you?

A They just called me and asked if I had been --

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Birch-cross

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1 if I had seen the FBI agents that day and that they just
2 confirmed that Harold had been arrested, and they asked
3 me when would I be returning to New York.
4

5 Q Did they ask you to return to New York?

6 A No.

7 Q Now, at that time, did you have any plans to
8 return to New York?

9 A No. Not at that moment, no.

10 Whose apartment was it that you and Harold
11 occupied? By "whose apartment" I mean in whose name was
12 it leased?

13 A Harold's.

14 Q When is the next time you saw an FBI agent or
15 prosecutor?

16 A That Thursday.

17 Q Thursday?

18 A Yes.

19 Q Are you sure you didn't see anyone sooner
20 than that? Your present recollection is that it was
21 Thursday that you next saw an FBI agent; right?

22 A That I talked with them.

23 Q What?

24 A That I talked with them, yes.

25 Q How about a prosecutor?

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Birch-cross

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MR. THAU: I will withdraw the question, your Honor.

Q When did you come to New York?

A The following Tuesday.

Q When?

A The following Tuesday.

Q That would be the 7th, right, of December.

Now, did you have a key to the apartment you had occupied with Harold?

A Yes.

Q Did you go to the apartment?

A I went that Thursday.

Q And how did you find the apartment when you entered it?

MR. KAPLAN: Objection. Irrelevant.

MR. THAU: I will put an offer of proof at the bench, if need be, your Honor.

MR. KAPLAN: I would appreciate that.

(At the side bar.)

MR. THAU: Your Honor, the offer is that the place was absolutely and completely ransacked and had been torn apart by the officers, and apparently certain things were found that subsequently Miss Birch was threatened with prosecution for possession of some of the stuff that

1 mppl4

Birch-cross

2 was in the apartment.

3 I think I have a right to elicit that.

4 MR. KAPLAN: I can't see what relevance it has
5 or why he has a right to elicit that. That the apartment,
6 as Mr. Thau terms it, was ransacked is absolutely ir-
7 relevant to the issues.

8 MR. THAU: The case doesn't hang on that.

9 THE COURT: Mr. Thau has just withdrawn his
10 question.

11 MR. THAU: No, your Honor. I didn't say that.

12 THE COURT: The objection is sustained.

13 MR. HOCHHEISER: He is establishing a threat
14 of prosecution to make sure she pleases those in a
15 position to prosecute.

16 MR. THAU: I want to illustrate the length
17 to which the law-enforcement goes and the extent to which
18 she is scared.

19 MR. KAPLAN: There is no good-faith basis for
20 it.

21 MR. THAU: Good-faith basis for what? For
22 asking whether the place was ransacked? You gave me a
23 long list of stuff seized.

24 MR. KAPLAN: Consistent with the consent that
25 Mr. Burnell gave me, which is not challenged.

mppy15

Birch-cross

1 MR. THAU: Your Honor, the government told me
2 they wouldn't offer any of the stuff found in the apart-
3 ment as evidence in this trial, so why should I bring on
4 a motion to suppress evidence which they promised me they
5 would not even offer?
6

7 THE COURT: It seems to me that what you are
8 interested in doing is showing threats which may have
9 influenced the woman's testimony. I don't see how a
10 threat to search the apartment has anything to do with
11 that.

12 MR. HOCHHEISER: It was her apartment that
13 was searched, and contraband was found.

14 MR. KAPLAN: There was no contraband found.

15 MR. THAU: Even worse. There was none found,
16 and they threatened her, anyway.

17 THE COURT: I will overrule the objection.

18 MR. KAPLAN: Your Honor, can I bring up the
19 threats that she received on the telephone?

20 THE COURT: Yes.

21 MR. KAPLAN: Thank you, your Honor.

22 (In open court.)

23 THE COURT: That is not a ruling, Mr. Kaplan.
24 We will take that up again.
25

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Burch-cross

(In open court)

CROSS-EXAMINATION CONTINUED

BY MR. THAU:

Q Miss Burch, when you got back to New York on Tuesday, the 7th, you went to your apartment?

A Yes.

Q You did not go --

THE COURT: She has already testified that she went to the apartment on Thursday.

MR. THAU: Thursday. I'm sorry.

Q And in what condition did you find the apartment?

MR. KAPLAN: When on Thursday?

Q When you went to the apartment for the first time --

MR. KAPLAN: What time?

MR. THAU: I don't know what time.

Q -- from coming up -- withdrawn.

The first time you went to your apartment after you came up from South Carolina, what time was it?

A I can't give you the exact time. I can -- it was around 1, 1:30 maybe. It was after we left MCC.

1 gtrr2

Burch-cross

2 Q And in what condition did you find the
3 apartment?

4 A The front window was broken out, the locks on the
5 door were jammed, the mailbox was broken and the place
6 was ransacked.

7 Q Ransacked?

8 A Yes.

9 Q Well, could you tell us what you mean by
10 ransacked?

11 A Well, my address book was missing, my picture
12 was missing, the picture of Harold and I was missing,
13 things were pulled from out the closet, the cabinets,
14 closets. It was just --

15 Q A mess?

16 A Yeah.

17 Q Okay.

18 From which you inferred that Harold was a very,
19 poor housekeeper?

20 MR. KAPLAN: I object.

21 THE COURT: Mr. Thau, please.

22 MR. THAU: I am sorry.

23 Q Now, was this discovery you made before or
24 after you saw a law enforcement official up here in New
25 York?

gtr3 Burch-cross

A Repeat the question.

Q Yes.

Did you go to the apartment where you saw those conditions before or after you first met an FBI agent or prosecutor up here in New York?

A Before.

Q And how did it come to pass that you saw an FBI agent again? Did they call you, did ou call them?

A When I went to theheadquarters, you mean?

Q Yes, up here in New York.

A I had -- they had -- I was staying with Harold's cousin on Southern Boulevard in the Bronx and they had been to her apartment every day ever since that Saturday.

Q Who is "they"?

A The agents had been there or called there.

Q Every day?

A That's what she said, almost every day.

MR. KAPLAN: Objection; move to strike the hearsay.

THE COURT: It will be stricken.

A And --

Q Continue.

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Burch-cross

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2 A They had called there and they had been
3 there --

4 Q Excuse me.

5 A The agents.

6 Q PLease don't tell us what the agents may
7 have told someone else who then reported to you.
8 Okay?

9 How is it that you went to the FBI or the
10 FBI came to you? Did they call you directly or was a
11 message left for you or what?

12 A A message was left for me. I wasn't there.

13 Q Okay.

14 So you called the FBI?

15 A I called there to find out about the apart-
16 ment, because when I called about the apartment I didn't
17 know that a message was left for me to go up there.

18 Q Okay.

19 A And they said they didn't know anything
20 about the apartment.

21 Q The FBI said that?

22 MR. KAPLAN: Objection. Move to strike the
23 hearsay.

24 MR. THAU: Where is the hearsay?

25 MR. KAPLAN: What the FBI said.

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MR. THAU: I will withdraw the question.

Q Well, which office of the FBI did you finally go to?

A In New Rochelle.

Q About what time of day did you reach there?

A About 4:30.

Q In the afternoon?

A Yes.

Q How did you go there?

A They had left a message for Arthur and I to come there.

Q Did you go there with Arthur?

A Yes.

Q Arthur would be Harold's brother, right?

A Yes.

Q Now, talking about Arthur, did you ever tell anyone that Arthur and Harold have so similar a voice that when Harold wasn't home and Arthur would call, you would often mistake one or the other?

A Yes.

Q And is that true?

A Yes.

Q Now, with respect to this similarity in voices, did you ever tell the FBI about this?

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Burch-cross

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A Yes.

Q When did you first tell an FBI agent that Arthur and Harold had identical voices?

A I don't recall the exact time.

Q Well, I am not asking you the time of day, Miss Burch, but in which of the interviews did you tell him that?

A I think I mentioned it when I heard the tapes. I'm not sure.

Q That would be on Thursday, the 9th?

Let me put it another way:

Do I take it that the first time you heard the tape was when you went up to New Rochelle with Arthur? Right?

A Yes.

Q Okay.

And you remember that to be a Thursday, right?

A Yes.

Q And that is the Thursday directly following Harold's arrest, right?

A But I don't remember everything I said that day.

Q No. I understand that.

What I am asking you is whether it is on that

1 gtr7 Burch-cross
2 day, Thursday, December 9th, that you first told the
3 agents that Arthur and Harold had identical voices.

4 A To my best recollection, yes.

5 Q And that would be when they first played those
6 tapes for you, is that right?

7 A Yes, that was the first time I heard the
8 tapes.

9 Q Do I take it, therefore, that when they
10 played those tapes for you -- withdrawn.

11 When they first played those tapes for you,
12 did you ever tell them not that it was Harold speaking,
13 but that it resembled Harold's voice? Isn't that
14 what you originally told them?

15 A I -- I used the word "sound like," yes.

16 Q Sound like?

17 A Yes.

18 Q And did you intend that to be a truthful
19 answer as best as you could give it?

20 A Yes.

21 Q Did you also tell them it sounds like
22 Arthur?

23 A No. The only -- the only -- the only thing
24 I said about Arthur was that they sound alike and I
25 always think it's Harold.

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Burch-cross

546

Q And did you tell this to the FBI agent before or after telling them that the voice on the tape sounded like Harold?

A I don't -- I don't recall.

Q You don't?

Now, did you ever say to anyone that on that Thursday at FBI headquarters you had been threatened and harassed by the FBI agents?

A I was threatened while I was there.

Q Okay.

Now, tell us about the threats.

Who made them and describe the threats.

A Well, they said that they found drugs in the apartment, and I could go to jail for that because my clothes were there.

And later they told me that I could go to jail for perjury. They asked me things, like, if I knew what it was like to be in jail and that they could have somebody there in five minutes to read me my rights, things like that.

Q And who said that to you? Do you remember the agent's name?

A (Shaking head)

Q You have to speak out.

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Burch-cross

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A No.

Q Would you recognize him if you saw him?

A It was a lot of t-em.

I was the only female there. There were a lot of them.

Q How many agents were speaking to you at any one given time?

A About three.

Q And how soon after you first got there did they mention perjury and drug arrests and so on?

A The drugs were mentioned first. I -- I don't know how long I was there. Maybe a couple of hours. I don't know. I'm not sure about the time.

Q Was Arthur with you at all times?

A No. They separated us.

They took me one way and they took Arthur some -- I didn't see Arthur any more. Arthur left me there.

Q Was that as soon as you came when you were separated or sometime later?

A We were sitting in a waiting room. As soon as the guy came out and got us, we were separated.

Q What time of day did you leave FBI headquarters?

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2 A I gothome about 2 o'clock the next morning.
3 Q How did you get home?
4 A They took me.
5 Q About how long was the ride, would you say?
6 A They took me back by the apartment before
7 they took me -- they took me back by 1818 Anthony
8 Avenue before they took me to Southern Boulevard.
9 Q Altogether, how long would you say you
10 spent at FBI headquarters in New Rochelle?
11 A Till after 12.
12 Q About eight hours, then?
13 A Approximately, yes.
14 Q Do you have your medicine with you?
15 A I have my bottles. My medicine is finished.
16 Q Did you on December --
17 A Oh, at New Rochelle?
18 Q Yes.
19 A I took it there. I told them, I explained
20 to them that I had been home -- from home that morning,
21 around 7, and I would like to go and come back another
22 day, but --
23 Q But?
24 A But they said no. They kept pressuring
25 me to take the polygraph.

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Burch-cross

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Q They kept pressuring you, you say?

A (Nodding head)

Q How long were you there when you asked to be permitted to come back some other time?

A Well, it was getting dark outside, so I guess around 6, 6:30, 7 maybe.

Q So that you were there about two, two and a half hours when you felt like going home, right?

A Yes, because I was taking medicine every six hours and it was time for me to take it at 6.

Q This medicine, is it the type of medicine which, after taking it, you ought not to drive or can you drive?

A I can drive, but sometime it makes me a little foggy.

Q A little what?

A Sometimes it makes me a little hazy if I haven't eaten, and I hadn't eaten that day.

Q When had you last eaten before you went up there?

A I didn't eat that day.

Q At all?

A No.

Q Were you fed at FBI headquarters?

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Burch-cross

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A They offered me pizza. They gave me a
soda.

Q Pizza?

A But I don't eat pizza.

Q So you had soda, you say?

A Yes.

Q About what time?

A It was real late.

Q So from the moment you got up in the
morning -- I will withdraw morning -- from the moment
you got up to 8 o'clock at night, all you had was soda?

A I didn't have -- I don't think I had the
soda that early.

Q I see.

Now, did they tell you that they would arrest
you on charges of perjury and possession of drugs?

MR. KAPLAN: Objection. Asked and answered.

THE COURT: I think it has been.

Q What else was said to you in connection
with the possibility of charging you for crimes?

A The drugs and the perjury was the only thing
that I can recall.

Q And this was perjury in connection with whta?

A They put me on the polygraph test and they were

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Burch-cross

551

1 asking me questions about if I knew where Buster was
2 and things like that, and the man said -- he asked me
3 if I was telling him everything that I knew in connection
4 with the case, and I said yes.
5

6 So he turned the machine off and he said
7 that he wasn't going to give it to me any more, because
8 every time he asked me that question the needle goes
9 wild that I was lying.

10 MR. THAU: Your Honor, may we take the
11 luncheon recess now. I think it may be appropriate to
12 approach the bench on another matter anyway.

13 THE COURT: All right.

14 The jury is excused until 2:15.

15 (The jury left the courtroom)

16 THE COURT: Mr. Thau?

17 MR. THAU: Perhaps the witness ought to be --

18 THE COURT: All right. We will excuse the
19 witness until 2:15.

20 (Witness temporarily excused)

21 MR. THAU: Your Honor, the witness spoke of
22 a polygraph, the traditionally forbidden word.

23 I am not particularly objecting to it,
24 frankly. However, she did speak of it. We knew that
25 she had been subjected to one. We had also been given

gtrl4

Burch-cross

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some graphs, but not results.

Now that the witness, the government witness, says that the polygrapher told her that she was lying when denying knowing of Buster's whereabouts, I think we are entitled to --

THE COURT: I don't believe that is what her testimony was.

MR. HOCHHEISER: Whether she had told the FBI all she knew.

MR. THAU: I see.

MR. HOCHHEISER: I think that was the question. That's what she said.

THE COURT: It was much more in that area than in the area you suggest, Mr. Thau.

MR. THAU: Perhaps in the heat of battle I forget things.

In any event, the graph is here and we can see for ourselves where the jumpy portion is. But I certainly am not expert in that matter.

I would ask for the polygraphist's report, your Honor, because if they ascribe falsity to this lady's statements, who knows but that she might have failed that part of the test in which she relates to the polygraphist that Harold Burnell told her certain things

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in November of 1976. We ought to know about this.

THE COURT: Mr. Kaplan?

MR. HOCHHEISER: Another basis for that, if I might suggest, your Honor, is that her answers to the polygraphist would be prior statements. Whether they are consistent or inconsistent would not be known to us at this point.

MR. THAU: We have some of them. They are right here, 3508H.

MR. HOCHHEISER: Those are questions, they are not answers, aren't they?

MR. THAU: Right.

MR. KAPLAN: Your Honor, I have given defense counsel what I was given by the FBI, which are the questions that were asked to her and the graphs, the polygraph sheets.

I have the original graphs if they want to examine them.

There was no report prepared of the findings by the polygraph examiner.

The polygraph examiner did not write down or take down her answers simply because it wasn't the answer that she gave that was the object of the exercise but, rather, the reading that he got on the

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Burch-cross

554

graph whether he could determine whether she was lying or telling the truth.

Defense counsel have all that I have. I can't see what else I can do with it.

MR. THAU: Your Honor, I don't understand at all what Mr. Kaplan says with respect to the purpose of the exercise., but that if that is all that he has, that means he hasn't gotten everything that there is to be had.

MR. KAPLAN: Mr. Thau knows if I had more or if I was told that there was more he would have it. 3500 imposes that obligation.

THE COURT: He is not suggesting that, Mr. Kaplan.

MR. THAU: I am not

THE COURT: He is suggesting that you have not been told that there was.

MR. THAU: That's all I am saying.

MR. HOCHHEISER: According to the 3500 material we got from the government, a large number of witnesses were given a polygraph test and each one asked about ten questions which had similarities in questions.

I think that it is a fair presumption on our part with our experience in this area that such a man

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Burch-cross

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1 asking these questions, which questions are listed
2 and they are dated and the person he is asking is mentioned
3 so there is a record of it, we could assume that with all
4 those questions which amounted to hundreds of questions
5 that someone must have written down the answers.
6

7 Why would a man feel it necessary to write
8 down the questions if he doesn't write down the answers?
9 And to what avail does the graph -- what purpose does
10 the graph serve when we find out an answer is right or
11 wrong when we don't know what the answer was?

12 Even the question has no meaning without
13 the answers, so the answers must exist somewhere.

14 MR. THAU: May I add, your Honor, that 3508J
15 is a waiver of rights form in which the full Miranda
16 warnings are given.

17 Why give Miranda warning unless you
18 intend to immortalize or in some other fashion remember
19 what it is that the person given the warning is going to
20 say.

21 THE COURT: Mr. Kaplan, may we hear from you
22 on this after lunch?

23 MR. KAPLAN: I was just going to suggest
24 that I will have the agent call up New Rochelle and see
25 if there is anything else that I don't know about.

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2 THE COURT: It seems to me to make good
3 sense, quite apart from whether defendants' counsel
4 are entitled to it or not, that when a question is
5 asked and charges either show a reaction or no reaction, it
6 is rather imperative to know what the answer was which
7 predicated or which is reported as involving a reaction or
8 no reaction.

9 MR. KAPLAN: Not being a polygraph examiner,
10 I can't really respond, but I will have the agent -- I
11 will call the polygraph examiner over the lunch hour and
12 see what I can find out.

13 THE COURT: I would suggest we meet back
14 at 2:10 because the jury is due back at 2:15 and we can
15 take this up then.

16 MR. KAPLAN: Very well, your Honor.

17 THE COURT: Thank you.

18 (Luncheon recess)
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A F T E R N O O N S E S S I O N

2.10 P.M.

(In the absence of the jury.)

MR. KAPLAN: Your Honor, might Miss Birch be allowed to go into the robing room so she is not privy to the conversation?

THE COURT: Yes.

(Pause.)

THE COURT: We will have to wait for the defendants.

MR. KAPLAN: Very well, your Honor.

(Pause.)

MR. KAPLAN: Your Honor, over the lunch hour, Mr. Graham spoke with the people up in the office at New Rochelle. It appears that we all did not understand these charts which I turned over as 3500 material, including myself.

On the bottom of the charts there are numbers 1, 2 3, 4, 5 and so on. Next to the number there is either a plus or minus.

The questions are such that the person answers yes or no. A plus indicates yes. A minus indicates no.

So defense counsel have the results as much as I have.

It is noted on the bottom of the chart, the

1 mpp2

2 questions are numbered, the answers are numbered, and a plus
3 or minus indicates whether the answer was yes or no.

4 I noticed that some of them are not clear.
5 I have the originals with me. If defense counsel wants
6 to examine them, look at them, look at the originals,
7 I will be glad to turn them over.

8 THE COURT: Thank you, Mr. Kaplan.

9 MR. THAU: Well, your Honor, looking quickly
10 at these charts, I see, for instance, that at page 2
11 of the charts there is a 5 minus, and there is what may
12 look like either an X or a plus, and then a 5, and right
13 next to it a minus.

14 But be that as it may, we are not polygraphists,
15 any of us here, I don't think, so that even though we might
16 know what the answers to the specific questions might be
17 based on the plus or minus formula just given us, we are
18 still nowhere as far as it concerns the polygraphists
19 opinion as to whether this lady was telling the truth or
20 was not; so we don't have the complete answer.

21 MR. KAPLAN: Your Honor, since polygraph evidence
22 is not admissible, the polygraph expert's opinion as to
23 whether he believed her to be truthful or untruthful is
24 not relevant.

25 Mr. Thau wanted to know whether she made any

1 mpp3

2 inconsistent statements, and that he has the answer to,
3 which is what he can examine her on cross-examination on.
4 He knows the questions she was asked. He knows if she
5 answered yes or no.

6 MR. THAU: Your Honor, whether the polygraph
7 tests or the results of such tests are admissible or not,
8 it is my view that when a polygraph test is administered
9 and an expert in that field renders an opinion to the
10 veracity or lack thereof of the person examined, certa'
11 defense counsel ought to have that report, and this is
12 quite aside from whether it is admissible before the jury
13 or not.

14 THE COURT: Mr. Thau, you have been told by
15 Mr. Kaplan that you have the report.

16 MR. THAU: No; I don't. I have the graphs.
17 I don't have the report.

18 THE COURT: Then I misunderstood Mr. Kaplan.
19 Did you not say that Mr. Thau has what there
20 is in the way of a report, Mr. Kaplan?

21 MR. KAPLAN: No, your Honor. What I said is that
22 Mr. Thau has the questions that were asked and the answers
23 that were given. There is, in addition, a one-line
24 Airtel, I think they call it, which was sent by the
25 examiner in New Rochelle to the office, the laboratory

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2 in Washington for their record-keeping purposes.

3 I do not believe that to be a statement
4 of the witness, and I don't believe that Mr. Thau is
5 entitled to it under 3500 to cross-examine this witness.

6 If he seeks to put the polygraph examiner
7 on the stand as to his report, we can cross the bridge
8 at that point, because I don't think polygraph results
9 are admissible in evidence at trial.

10 MR. THAU: I am sorry. Are you finished?

11 In all my experience with polygraphists, whether
12 they be retained by the defense or by the prosecution,
13 every one of these people renders a written report comment-
14 ing on his opinion as to the truth, veracity or lack thereof
15 of the person examined.

16 I assume from prior experience that the same
17 thing was done in this case, and all I am asking is
18 for that report. I don't know whether I am making myself
19 clear.

20 THE COURT: Well, I think you are making
21 yourself clear, and I thought that Mr. Kaplan made himself
22 clear that there is no such report.

23 Now, maybe I am misunderstanding Mr. Kaplan,
24 but it is my understanding that he has said that you have
25 the report. Am I right on that or wrong? Is there

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2 some sort of a Telex to Washington?

3 MR. KAPLAN: There is a Telex to Washington.
4 Mr. Thau does not have the contents of that.

5 THE COURT: Is there anything else he doesn't
6 have?

7 MR. KAPLAN: No. That's it.

8 MR. THAU: Your Honor, may I put it squarely
9 whether there is such a report as I described a few moments
10 ago?

11 MR. KAPLAN: There is no report. All there is
12 is a Telex, where the examiner gave a one-sentence opinion,
13 if it can be called an opinion, which was sent internally
14 from one agent in the FBI to another agent in the FBI who
15 runs the laboratory down in Washington, for his record-
16 keeping.

17 MR. THAU: That is the report.

18 THE COURT: It is not a statement of the
19 witness.

20 MR. HOCHHEISER: No, but it is an interpretation
21 of the test. The graph does not mean anything to us,
22 showing the interpretation of the graph. We can't read it.
23 The key to it is the man's assessment of, as they term it --
24 they don't say the person lied or told the truth, but they
25 say whether there is deception or not, based on the inter-

mpp6

pretation of the graph. It is not a hearsay statement. It is technically an expert opinion. But we are looking at the work of the expert, the graphs and the questions, and we have the answers, but we have to know what that means, and the polygraph expert has stated in the report -- he has reported to someone -- what that means.

I am sure he is saying -- in fact, I would guess he would probably have to make a remark about each question and answer, but certainly if not, about the person, whether there was deception present or not, and that would give us an understanding as to what the graphs are about.

I think under Brady vs. Maryland, if nothing else, we would certainly be entitled to know if someone didn't pass or wasn't being honest in the judgment of the polygraph operator, not so much that we could go that before the jury, which might not be proper, but so that we could take whatever steps were necessary to concentrate on showing the particular witness to be untruthful or to establish the facts that we seek.

But at least I think if there is such evidence like that it comes in under the alternative ground of Brady.

MR. KAPLAN: Your Honor, if Mr. Hochheiser

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urges this as a Brady ground, I will approach the side bar and disclose the report ex parte and let your Honor determine if it is Brady material, and if it is, we will disclose it to them.

MR. HOCHHEISER: I advance that as an alternative ground.

THE COURT: To do what?

Really, what I am reaching for is a possible basis on which Mr. Thau thinks he is entitled to this, and Brady is the first thing that I have heard so far that even gives any foundation at all.

If I think you are entitled to it under 3500, you have been given, as I understand it, the complete part of this polygraph which constitutes a statement of the witness, which is my understanding of what you are entitled to under Section 3500.

MR. HOCHHEISER: Well, we are all also --

THE COURT: If it is Brady, while I find it difficult to conceive of how this is Brady material, but maybe there is a basis that I don't see --

MR. HOCHHEISER: Your Honor, why isn't this obtainable by the defense as a scientific test? Isn't it a scientific test? Why do we not receive the conclusion of the expert but just the graphs?

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THE COURT: I have always understood that you are entitled to scientific tests which the government intends to submit into evidence. I never understood that you were entitled to every scientific test where the government makes an investigation of a crime that ultimately ends in an indictment.

MR. HOCHHEISER: I can't think of any reason why not, frankly. I think that this could be useful.

Suppose there was a voice identification test, even if it is inconclusive. I would certainly be entitled to know how the test was conducted and all the data about that.

I don't see why this isn't obtainable as a scientific test.

MR. THAU: Your Honor, quite aside from whether we are entitled to every scientific test, my recollection is that Mr. Kaplan wrote us a letter committing himself to sending the results of any scientific test; so if I am right in my recollection and if Mr. Hochheiser is correct in his that it is a scientific test --

MR. KAPLAN: Your Honor, in my letter of January 6th to both Mr. Thau and Mr. Hochheiser, I stated that pursuant to Rule 16(a)(1)(d), the government will furnish them with any physical or scientific tests made

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in connection with this case.

The rule provides that such reports are to be turned over which are material to the preparation of the defense or are intended for use by the government as evidence in its case in chief, and 16(a)(1)(d) provides, "Except as provided in Paragraphs (a), (b) and (d), this rule does not authorize the discovery and inspection of reports, memoranda or other internal government documents made by government agents in connection with the investigation or prosecution of the case."

I would submit that we come within the exception here.

However, rather than belaboring the point, I will disclose the contents of the report, since the defense can't use it anyway.

MR. HOCHHEISER: So why didn't you say so?

THE COURT: I am not sure that is a proper basis for disclosing it, Mr. Kaplan.

MR. KAPLAN: Well, your Honor, rather than belaboring the record, I will disclose it.

We got this orally on the phone, and I will read it for the record.

"On 12/9/76, polygraph examinations were administered to Mary Burch and Arthur Burnell

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2 after signing appropriate polygraph forms.

3 Physiological reactions indicative of the ^{deception} section ~~1~~
4 were noted."

5 That is what I have. That was the Airtel that
6 went from New Rochelle to the Bureau in Washington.

7 MR. THAU: Does that apply to both witnesses,
8 may I ask?

9 MR. KAPLAN: This applies to Arthur Burnell
10 and Mary Burch.

11 MR. THAU: Would your Honor take judicial
12 notice that lying and deception are basically two synonymous
13 terms?

14 MR. KAPLAN: Your Honor, could I ask?

15 THE COURT: Just hold it a minute.

16 I think I would at least take practical
17 notice that apparently whoever wrote that report did not
18 distinguish between the two to the extent that either
19 the government or the defendants or the Court could build
20 upon that decision in the course of this trial.

21 MR. KAPLAN: Your Honor, Mr. Nissenbaum is
22 seated in the courtroom. He is the grand jury reporter who
23 took Miss Burch's testimony before the grand jury. He
24 is free this afternoon but must be present elsewhere tomorrow.
25 I would ask at some point this afternoon, with the leave

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2 of the Court, to put Mr. Nissenbaum on, simply to testify
3 that he has examined his notes, and he finds that the
4 testimony as reflected in the minutes is true and
5 accurate, in that it does not say the word "probably"
6 in that question where Miss Burch said she said "probably"
7 to the grand jury, today.

8 THE COURT: Any objection?

9 MR. THAU: Has Mr. Nissenbaum inspected the
10 tapes?

11 MR. KAPLAN: He has inspected his notes.

12 MR. THAU: Well, I will stipulate to that.

13 THE COURT: Why don't we put that on the
14 record now?

15 MR. KAPLAN: It is hereby stipulated and
16 agreed by and between the government and the attorneys
17 for the defendants that if called as a witness, Stewart
18 Nissenbaum, grand jury reporter, would testify that he
19 was the grand jury reporter present on December 13, 1976,
20 before a grand jury of the United States and that he took
21 stenographic minutes of the testimony of Mary Burch
22 before said grand jury and that if called to testify,
23 Mr. Nissenbaum would testify that Miss Burch was asked
24 the following question and gave the following answer:

25 "Q Was there any talk about removing Buster

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2 from the United States or from the State of New York?

3 "A I said, like I said, 'Why are you going to do
4 that? What are you going to do with him? It doesn't
5 seem real,' you know, so he said, you know, 'Tico would
6 have somebody take him out of the States.' He would never
7 be found.

8 "That's all he said."

2 9 So stipulated, gentlemen?

10 MR. THAU: Yes, sir.

11 MR. HOCHHEISER: Yes. I stipulate to that,
12 your Honor, but I have a different objection here. I have
13 the hearsay objection compounded by the fact that if I
14 recall correctly somewhere in those grand jury minutes
15 she said she is giving her interpretation, and she is
16 really sure that Burnell said that Tico was actually
17 going to do these things, and it seems that that is what
18 she thought he meant.

19 MR. KAPLAN: No, no. Page 50, the last
20 question was:

21 "Q Take him out of the States, meaning taking
22 Buster Huggins out of the United States; is that correct?

23 "A That's my interpretation. I didn't question
24 it."

25 Her interpretation is, what do the "States"

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2 mean, and she has interpreted it to mean "take him out
3 of the United States." It has nothing to do with whether
4 she said "probably" before the grand jury or not.

5 THE COURT: It is not a qualification on the
6 previous answer. It is an interpretation of the meaning
7 of the previous answer.

8 MR. HOCHHEISER: An interpretation of the
9 meaning of the previous answer.

10 THE COURT: That is the way I heard it. She
11 had given a previous answer, and then she tells what her
12 interpretation of "out of the States" is.

13 MR. HOCHHEISER: I make objection on the grounds
14 it is hearsay and not subject to cross-examination.

15 THE COURT: She is on the stand. She is
16 subject to cross-examination.

17 MR. HOCHHEISER: I know that, your Honor.
18 She is subject to cross-examination, and that is one of
19 the bases, I believe, for admissibility of this type of
20 evidence.

21 MR. HOCHHEISER: I know, and I think that the
22 Federal Rules of Evidence took a step -- I don't know if
23 it's forward or to the side or backwards, but they took
24 a step or departed from the norm when it authorized this
25 kind of thing, and I think that it is difficult enough

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2 and dangerous enough when you are talking about an out-
3 of-court sworn statement which comes in against your
4 client, notwithstanding it is contrary to an answer
5 that a witness gives on the stand in court, but now
6 we are going actually a step further. Now it is not only
7 a sworn out-of-court statement which is coming in under
8 an exception to a rule, but now the damage is being done
9 by a statement which has an impact not on the client whose
10 attorney is cross-examining this witness but on the other
11 attorney's client, and I think that is one step removed,
12 and I think that we get to a point where it becomes offensive
13 to the Constitution.

14 I never liked the rule, to start with. I know
15 it's been accepted. I know it's in the books. I think
16 it has dangers in it. But now applying it in this
17 situation, where the dangers are greater than what are
18 usually argued in the courtrooms, I think that it should
19 be limited.

20 THE COURT: Well, Mr. Hochheiser, I spoke a
21 little too hastily.

22 As I understand it, a prior statement under
23 oath would be admissible even if the witness was not
24 subject to cross-examination, but in this particular case,
25 the witness is subject to cross-examination, and she is

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2 subject to cross-examination by Mr. Thau and by you.

3 Now, to the extent that you request any
4 limiting instruction to the jury beyond those I have
5 already given, I certainly will entertain that sug-
6 gestion.

7 MR. HOCHHEISER: The problem is, Judge,
8 most respectfully, I just don't feel that if I am right
9 about the prejudice that exists here, a limiting in-
10 struction is capable of curing it. I would be tempted to
11 say I suggest thus and so for a limiting instruction, but
12 in all honesty, your Honor, I just don't feel it has any
13 possibility of curing it.

14 To save the record from appearing as though
15 I might be waiving something, some alternative that the
16 Court of Appeals might feel would be the right alternative
17 but I had let it go, I would say as an alternative if
18 your Honor is going to allow the testimony to come in,
19 then I suppose --

20 THE COURT: Mr. Hochheiser, you have made a
21 general objection to something that you don't like the
22 constitutional taste or sound of, but this didn't come to me
23 as any specific objection that I could rule on.

24 MR. HOCHHEISER: Oh, yes. First of all, the
25 general proposition I am talking about in this case is the

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2 sworn grand jury minutes, sworn grand jury statements
3 coming in not to impeach the witness but as evidence in
4 chief.

5 MR. KAPLAN: That is what the rule says, and
6 has been the law in this circuit since the ^{DeSisto} ~~DeSisto~~ case, de-
7 cided by Judge Friendly about 15 years ago.

8 MR. HOCHHEISER: Well, it is a departure from
9 the common law. It didn't become acceptable all over
10 in the Federal jurisdictions until the recent changes in
11 the Federal Rules of Evidence.

12 THE COURT: To the extent that the objection
13 is to its admissibility, I overrule that objection on that
14 ground.

15 MR. HOCHHEISER: Okay.

16 THE COURT: On the ground that it departs from
17 the common law.

18 MR. HOCHHEISER: It is not a ground that it
19 departs from the common law. I was pointing out the
20 dangers inherent in it.

21 Now, it is as good a basis as there is for
22 controversy, where it simply affected the person who had
23 the conversation with the witness, but we are now going
24 a step beyond what the writers of this statute had en-
25 visioned, where it is coming in not only as affirmative

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evidence affecting Mr. Burnell, but it has a spillover effect upon my client.

I think we are departing too far. I think it is beyond the purview of what the writers had intended or what the Congress had intended.

THE COURT: How is this any different from the discussion we had yesterday about the testimony of Miss Burch on this subject matter?

MR. HOCHHEISER: It is one less step removed. Here Miss Burch is swearing to the jury that which Mr. Burnell says about Mr. Moore. I objected because I felt it was hearsay. It was not in the course of the conspiracy or in furtherance of it. Your Honor overruled me. Now she is going one step further. Now she is saying that is what Mr. Burnell said that is what Mr. Moore said, and now she is saying that Mr. Burnell didn't say that about Mr. Moore, and some time under cross-examination not in my presence Miss Burch says something incriminatory about Mr. Burnell, what he said about Mr. Moore.

MR. KAPLAN: Your Honor, the Supreme Court has held in California v. Green that since Miss Burch is now available for cross-examination by Mr. Hochheiser, Mr. Hochheiser's rights are fully preserved and that the evidence put forward by the grand jury minutes can be

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2 dealt with by Mr. Hochheiser.

3 Miss Burch is going to say, "I didn't say
4 before the grand jury." I can argue what the grand
5 jury minutes say, and we will see what happens. But
6 he has full latitude to cross-examine about it.

7 THE COURT: I seem to remember Learned Hand
8 in some case, not on this precise set of facts but something
9 close to it, saying, I think, that the jury has before it
10 the witness, the present statement and the past statement,
11 and there is the opportunity to cross-examine, and it is
12 in a very good position to make up its mind.

13 MR. HOCHHEISER: I think Mr. Kaplan is correct
14 in his reporting of what these cases hold. However,
15 these cases have all dealt with objections and lawyers
16 in Mr. Thau's position to testimony coming in against
17 somebody like in Mr. Burnell's position. But I am, as I
18 say, one step removed. I have to examine a witness about
19 not what she claims Mr. Burnell said my client said but
20 what she in the courtroom says she denies what Mr. Burnell
21 said that she said what my clientsaid, and now they come
22 in with a statement that she said that Mr. Burnell said
23 that Mr. Moore said something incriminatory, and I am so
24 far removed as co-counsel that I don't think this rule
25 can be carried out vis-a-vis Mr. Moore in a constitutional

1 mpp

2 fashion unless the parts that apply to him are redacted.

3 This is my argument.

4 (Continued on next page.)

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jqrl

Burch-cross

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THE COURT: To the extent that that is a

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motion to either exclude or I guess it would be now to

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remove the grand jury testimony because the testimony

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is already in, or to restrict it, it is overruled except

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that I will give any cautionary instruction to the grand

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jury that you suggest that is consistent with law.

8

MR. HOCHHEISER: Yes, your Honor.

9

Your Honor said grand jury, I am sure you

10

meant petit jury.

11

THE COURT: I did.

12

MR. HOCHHEISER: In the alternative then,

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my application would be, and only as an alternative

14

in view of your Honor's decision, that your Honor

15

explain to the jury that at this juncture that what Mr.

16

Burnell is reputed to have said about what Mr. Moore

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said to Mr. Burnell, that that cannot be taken as

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binding upon Mr. Moore unless or until it is determined

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that this was said in the furtherance of the conspiracy

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and during the course of the conspiracy.

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Otherwise, it is simply hearsay and not

22

subject to cross-examination and not subject to the

23

oath when allegedly said by Mr. Burnell.

24

I think in this kind of situation I think

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really the jury really has to kind of make a choice in

jqr2

Burch-cross

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2 applying the Geaney doctrine as to really when and if this
3 becomes connected up because it is so far removed. I
4 don't see how the Court can make a judgment whether something
5 that is removed like that is ever connected up after the
6 conspiracy to, say yes that is binding against him,
7 no it isn't.

8 I think that becomes a question of fact
9 rather than a question of law.

10 MR. KAPLAN: Your Honor, it is my under-
11 standing of the Geaney standard that your Honor at the
12 end of the government's case makes a finding based on I
13 guess preponderance of the evidence, or however the
14 standard is ^{phrased} raised, I forget, that the government has
15 shown, one, that there is a conspiracy and, two, that
16 each of the defendants were members.

17 If your Honor makes such a finding at the
18 end of the government's case all of the testimony then
19 goes to the jury. The jury is then instructed that it
20 can consider any statements which they find were made during
21 and in furtherance.

22 So if Mr. Hochheiser is asking that your
23 Honor tell the jury that before they can consider the
24 statements that Mr. Burnell made to Miss Burch they must
25 first find that they were made during and in furtherance

1 jqr3

Burch-cross

2 of the conspiracy I have no objection to it.

3 But if he is also asking that the jury
4 go about making a Geaney finding then I do object to it
5 because that is not the jury's prerogative, that is your
6 Honor's prerogative and then the statements go to the
7 jury for whatever they want to do with them.

8 MR. HOCHHEISER: I don't think we have any
9 problem. I think there is an a fortiori logical
10 concept here. If your Honor makes a finding and doesn't
11 naturally tell them what your Honor's finding is but
12 simply says you cannot consider these hearsay statements
13 unless or until you as a jury find as a matter of fact
14 that there was a conspiracy and that both of these men
15 were members of it I think that the second half of Mr.
16 Kaplan's remarks are really academic because they are
17 really making that decision to the extent of proof beyond
18 a reasonable doubt.

19 THECOURT: Well, except that I don't
20 think I would be inclined to tell them the second
21 part of what you suggest I would tell them. I don't
22 think that the jury plays around with what evidence
23 it listens to and what evidence it does not listen to at
24 the time that a Geaney finding has been made by the
25 Court.

1 jqr4

Burch-cross

2 At that point the jury determines whether there
3 was a conspiracy and if the two defendants have been
4 connected with that conspiracy by all of the evidence in
5 the case --

6 MR. KAPLAN: That is correct, your Honor.

7 MR. HOCHHEISER: I always felt -- I don't
8 know. It seems there are different views of Geaney
9 and everyone seems positive of what it is. When I read
10 Geaney I find that what Geaney is saying is that they
11 have to find independently of the hearsay that the defen-
12 dants are connected to the conspiracy.

13 MR. KAPLAN: That is not the Geaney
14 standard, your Honor.

15 THE COURT: I am not sure that we are going
16 to move ourselves along to a productive afternoon by
17 determining what Geaney actually meant. The question
18 for us right now is what if anything do I tell the jury
19 with respect to the testimony of Miss Burch.

20 MR. HOCHHEISER: At least that to the
21 extent that the testimony or the grand jury minutes
22 which will be introduced as affirmative evidence reflect
23 what Mr. Moore allegedly said to Mr. Burnell that that is
24 not binding upon Mr. Moore unless or until it is
25 determined that there was a conspiracy and that these

jqr5

Burch-cross

things were said in furtherance of the conspiracy.

Whether that later becomes amplified to mean by all the evidence in the case or whether your Honor adopts the approach as suggested, that it's by independent evidence, I don't think it's important at this point unless they know or as long as they know that hearsay is hearsay and that it only comes in against the man if they find it's made during and in furtherance of the conspiracy.

MR. KAPLAN: Your Honor, the government would ask the Court to give the same instruction that it gave on Friday when the first bit or when this conversation came in the first time which was "Ladies and gentlemen of the jury, the witness has just testified about a conversation which he had with Harold Burnell. That testimony referred to Mr. Moore is being received by me subject to connection with respect to Mr. Moore but it is hearsay so far as he is concerned because he was not there and it was not a conversation with them."

I think that sort of an instruction leaves the options open for your Honor's later rulings.

THE COURT: Will that meet your needs, Mr. Hochheiser?

MR. HOCHHEISER: Yes, your Honor. As I

1 jqr6

Burch-cross

2 said, this is a secondary alternative which I would prefer
3 not to choose but I would choose it over nothing.

4 THE COURT: All right.

5 I am addressing this now to the spectators
6 in the rear of the room. I don't want any conversation
7 in this courtroom. This is a room with very bad
8 acoustics. Any word that is said in this room can be
9 heard in various parts of the room and I don't want any
10 conversations between spectators overheard by the
11 jury and hence I do not want any conversations by spec-
12 tators. Is that clear?

13 Thank you.

14 MR. KAPLAN: I assume we will have that
15 stipulation read to the jury at the close of the witness'
16 testimony?

17 THE COURT: Yes, I think that is probably
18 best.

19 (In open court; jury present)

20 M A R Y F R A N C E S B U R C H resumed.

21
22 THE COURT: Ladies and gentlemen of the
23 jury, there has been testimony before you concerning
24 conversations which allegedly took place between the
25 witness and Mr. Burnell. There was reference in those

1 jqr7

Burch-cross

2 converstaions to Mr. Moore. I instructed you I believe
3 on Friday, and I repeat and somewhat amplify that
4 instruction today, those conversations are received
5 against Mr. Burnell and they are recieved with respect
6 to Mr. Moore only subject to connection.

7 They arehearsay so far as Mr. Moore is
8 concerned because he was not a party to the conversation.
9 He had no input with respect to the conversation. So
10 they have been received only subject to connection and
11 that connection, I will charge you on this greater detail
12 further, that connection will be if there is evidence
13 of the existence of a conspiracy and that Mr. Moore
14 is connected with that conspiracy.

15 You have to remember that evicence comes in
16 in steps and pieces and the determination on whether
17 there is or is not a conspiracy is one that can only
18 be made after the evidence has come in and the determin-
19 ation on whether or not a particular defendant has joined
20 that conspiracy is one that can only be made after
21 considerable evidence or most of the evidence is in.

22 So I cautoin you again that the testimony of
23 convesations with Mr. Burnell insofar as they refer to Mr.
24 Moore are hearsay and they are received so far as Mr. Moore
25 is concerned only subject to connection.

1 jqr8

Burch-cross

2 Mr. Hochheiser, does that satisfy you?

3 MR. HOCHHEISER: Yes, your Honor.

4 THE COURT: Mr. Thau?

5 MR. THAU: Thank you, your Honor.

6 CROSS-EXAMINATION CONTINUED

7 BY MR. THAU:

8 Q Miss Burch, on the first visit you paid to the
9 FBI at New Rochelle did you immediately tell them of
10 this conversation Harold Burnell had with you in
11 November or did you at first deny such a conversation
12 just as you had when you had been interviewed in South
13 Carolina?

14 A I denied it at first.

15 Q How long is it that you kept on denying it
16 before you finally spoke of it, that is in terms of
17 time, like an hour, a minute?

18 A An hour?

19 Q An hour.

20 A I am asking you.

21 Q I am asking you.

22 In other words, give me in terms of a time
23 unit. Let's put it this way: At first you stood on the
24 account you had given in South Carolina the week before,
25 right?

1 jqr9

Burch-cross

2 A Right.

3 Q Then there came a time when you changed your
4 account, is that right?

5 A Right.

6 Q What I am asking you is how long after the
7 beginning of the interview with the FBI in New Rochelle
8 did you tell them that Harold Burnell had told you
9 something or other in November concerning this?

10 A I guess it was around 10:30, 11 o'clock.

11 Q And you had gotten there at about 8:30 you
12 said? 4:30, I am sorry.

13 A Yes.

14 Q So that for six hours or so you maintained
15 the position you had taken in South Carolina when
16 you had been interviewed, right?

17 A Right.

18 Q Is it within that first six hours or so
19 that you were threatened with arrest?

20 A Yes, I was threatened.

21 Q Was it within the first six hours of your
22 interview up there?

23 A Yes.

24 Q Was it between 4:30 and 10:30 that they
25 threatened you with arrest?

1 jqr10

Burch-cross

2 A Yes, sir, they threatened me, yes.

3 Q Was it within that period of time that they
4 discussed perjury with you?

5 A Yes.

6 Q Was it within that period of time that you
7 asked them if you could come back another day and they
8 insisted that you proceed onward that same day?

9 A Before I was threatened about perjury I
10 asked them if I could come back another day.

11 Q Did you ask to speak to any friends or
12 relatives, attorneys?

13 MR. KAPLAN: Objection, irrelevant.

14 THE COURT: Overruled.

15 A I asked about Arthur and they said don't
16 worry about him, he has already taken it and he is going
17 on home.

18 Q When you said you asked about him, were you
19 asking how he was feeling or did you ask to see him?
20 Tell us what you mean when you say you asked about
21 Arthur.

22 A I asked him where is Arthur, you know, I
23 asked if he was going to take the polygraph test.

24 Q Did you ask to see Arthur?

25 A Not see him, no.

1 jqrll

Burch-cross

2 Q You didn't have anywhere specific to go
3 that evening, did you? You didn't have any vital
4 engagement, did you?

5 A No.

6 Q Why is it then that you would have
7 preferred to resume the interview on another day
8 rather than continue on since you had nothing-else to
9 anyway?

10 A Like I said, I hadn't eaten all that day
11 and I left home at 7 that morning and I was taking
12 the medication and I had taken medication while I was
13 there.

14 Q Were you feeling ill?

15 A Not really ill, no.

16 Q Were you feeling scared?

17 A Yes.

18 Q Threatened?

19 A Yes.

20 Q Harassed?

21 A Yes.

22 Q Have you ever passedout before in your
23 life, that is before Friday when you did so right here
24 in court?

25 A Yes.

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jqr12

Burch-cross

Q Did you pass out that Thursday at the FBI headquarters in New Rochelle?

A No, I passed out after I got back to the apartment. I was crying and hysterical because I was taking the medication. I didn't take medication on Friday.

Q When you say you were crying where is it that you were crying-

A At the headquarters.

Q At headquarters?

A Yes.

Q Were FBI agents around as you were crying?

A I didn't hear you.

Q Were FBI agents around you or in your vicinity as you were crying?

A Yes, they were around me. They were asking me such things like do I know what it's like to be in jail and stuff like that.

Q Were the FBI agents or any of them making it clear to you that they wanted information that would incriminate Harold Burnell?

MR. KAPLAN: Objection.

THE COURT: Objection sustained.

Q Did the agents tell you in words or substance

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Burch-cross

that a lot of evidence already pointed to Harold
Burnell's guilt and that you might as well tell them what
you knew?

MR. KAPLAN: Objection.

THE COURT: Overruled.

A Repeat the question, please.

(Question read)

A Yes, they said that he would be going to
jail for a long time and that when he came out I would
be old, things like that. They were telling me the
terms. They said the crime that he had committed,
the sentence was 20 years and stuff like that they said.

Q That is all?

MR. KAPLAN: Objection.

MR. THAU: That was a question, not a
comment.

THE COURT: Objection overruled.

Is that all they said?

THE WITNESS: That is mostly what I can re-
call.

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qpl

Q Were you told what if anything was expected of you in order for you to avoid a prosecution either for possession of drugs or for perjury?

A I don't understand the question.

Q Let me backtrack a bit.

The agents told you that you might be liable for prosecution for possession of drugs, right?

A Yes, they told me.

Q And perjury, right?

A Yes.

Q Was anything said to you concerning how you might avoid being prosecuted for these two crimes?

MR. KAPLAN: Objection.

THE COURT: Overruled.

A Mostly what they said was that if I knew anything I should tell them, answer the questions they were asking me if I knew the answer.

Q Did you ask them, "Well, am I going to be prosecuted?"?

A No, they just said if I was telling the truth I didn't have anything to worry about, you know.

Q Miss Burch, you testified Friday about Harold Burnell and you intending to buy a mobile home, do you remember?

qp

Burch-cross

590

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A Yes.

3

Q How much was that mobile home to cost?

4

A \$17,000.

5

Q Had a deposit been made on it?

6

A Yes.

7

Q How much was the deposit?

8

A \$100.

9

Q And that was made before the discussion you had

10

told us about, isn't that so?

11

A Yes.

12

Q When was the deposit made?

13

A In October.

14

Q And was it planned that anybody other than you

15

and Harold would assist you in purchasing that mobile home?

16

Let me put it another way.

17

Weren't your relatives and his to assist?

18

A Yes.

19

Q Tell us about it. Who was to contribute what?

20

A His mother -- at the time my grandfather was

21

living. His mother and my grandparents were going to

22

help us with the down payment. We only needed \$3000 to

23

bring the trailer out and get it set up and everything and

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then we were going to find jobs here and keep up the

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monthly payments.

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Burch-cross

591

Q So that all you needed was \$3000 for the mobile home to be delivered to you, right?

A Right.

Q And the rest would be paid off as a mortgage would be on a regular home, is that right?

A Right.

Q Over a period of years, is that right?

A Right.

Q And how much were the relatives to contribute to that initial \$3000?

A Half.

Q \$1500?

A Yes.

Q Did Harold Burnell ever tell you that he intended to apply kidnap ransom money to a mobile home?

A No.

Q You went to see Harold Burnell at the Metropolitan Correction Center before visiting the FBI here in New York, right?

A Yes.

Q At that time, this was the first time you had seen him since his arrest, is that correct?

A That was my first time I seen him since November 18, yes.

qp

Burch-cross

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Q And did you discuss the case with him and the charges?

A I just asked him, you know, what happened. It really wasn't a discussion, and he said he had gone out to Korvette's.

MR. KAPLAN: Could you keep your voice up.

A (Continuing) He said he had gone out to Korvette's to pick up a Copy Kat for the kids at Christmas.

Q A Copy Kat is a toy, right?

A Yes.

Q Did you and he discuss any tapes on that first visit you made to the Metropolitan Correction Center?

A I didn't know anything about any tapes, no.

Q Did he tell you anything about the tapes, about his having learned that there were tapes in the case?

A No.

Q Did there ever come a time, Miss Burch, when Harold Burnell told you at the Metropolitan Correction Center that it was not him on the tapes?

A Yes.

Q And when is it that he told you this?

A That Thursday --

Q I am sorry?

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QP

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A That Friday.

3

Q That was after you had testified before the

4

grand jury or before?

5

A Before, when I first told him that I had

6

heard the tape.

7

Q And he told you, "That is not me," right?

8

A At first, yes, when I mentioned the tapes, yes.

9

Q You told us this morning that you had told the

10

FBI agents of the great similarity between Harold and

11

Arthur's voices. Did you also tell any prosecutor about

12

that? By prosecutor I mean Mr. Kaplan or Mr. Farkash.

13

A Yes.

14

Q Who did you say it to and when?

15

A I told Mr. Kaplan on, I think, it was Monday.

16

Q Monday of which week?

17

A Last week.

18

Q A week ago today?

19

A Yes.

20

Q The FBI agents, you told them that way back in

21

December, right?

22

A Yes.

23

Q Is it true that when Arthur would call you on

24

the telephone you would think it was Harold?

25

A Yes.

qp

Burch-cross

594

1 Q Did Harold Burnell ever tell you that he wouldn't
2 have anything to do with any kidnap?
3

4 A Yes.

5 Q Did he at MCC tell you that he had nothing to
6 do with the kidnap?

7 A He said that he didn't know anything about it.

8 Q Did he tell you that he had nothing to do with
9 it?

10 A Yes.

11 Q Miss Burch, assume for a moment that Arthur
12 Burnell was seated at this table as a defendant in this
13 case and assume further that the same tapes played for you
14 today were again played for you.

15 Could you swear to the identity of the man
16 speaking on those tapes?

17 A I could say it sounds like Harold.

18 Q Does it sound like anyone else?

19 A I never knows it's Arthur until he tells me it's
20 Arthur.

21 Q I'm sorry, I don't hear you.

22 A I never know it's Arthur until he tells me it's
23 Arthur.

24 Q Do I take that to mean it sounds like Arthur
25 also?

qp

Burch-cross

595

1
2 A Sounds like Harold.

3 Q Let me try to clarify something here.

4 You said a moment ago that you never know that
5 it is Arthur until he tells you that it is Arthur?

6 A Right.

7 Q Well, who do you think it is before the voice
8 on the phone tells you it's Arthur?

9 A I think it's Harold.

10 Q On the tapes you listened to the man speaking
11 doesn't say either this is Arthur or this is Harold, right?

12 A Right.

13 Q You said that in November of 1976 Harold Burnell
14 told you of a certain plan, is that right?

15 A Yes.

16 Q Before you informed the FBI of this on
17 December 9, 1976, did you ever tell anyone else about it?

18 A Before I told the FBI?

19 Q Yes.

20 A No.

21 Q Did Harold tell you that he himself was cooking
22 up a plan in which he would be actively engaged in kidnapping
23 anyone or did he tell you that he knew of such a plan
24 of somebody else's making?

25 A He knew of a plan of someone else's.

qp

Burch-cross

596

1 Q Did he at that time, Harold, tell you that he
2 was going to participate in an abduction?
3

4 A No, he said he wouldn't have anything to do
5 with it. He would go to work that day just like he always
6 did.

7 Q Did he, Harold, tell you that he would assist
8 or aid such an abduction?

9 A No.

10 Q That he would finance it?

11 A No.

12 Q That he would provide either weapons or
13 premises for such an abduction?

14 A No.

15 Q Did he, Harold, tell you whether he personally
16 had any kind of grudge against Buster Huggins?

17 A No.

18 Q Did he not, in fact, tell you that those others
19 who were cooking up the plan did have a grudge and reason
20 for their plan?

21 A Yes.

22 Q Yes?

23 A Yes.

24 Q And that the reason was that Buster Huggins
25 had ripped-off three Rastafarians, you told us?

1 qp

2 A Yes.

3 Q What is a Rastafarian, if you know, or what is
4 your understanding of a Rastafarian?5 A They are vegetarian-type people. They don't
6 eat eggs, no meat. They don't cut or comb --

7 Q Excuse me, I can't hear you.

8 A They are vegetarian-type people. They don't
9 eat meat or eggs. They don't cut or comb their hair,
10 they only wash it, they dread-lock their hair.

11 Q Dread-lock, what does that mean?

12 A They don't comb it or anything, they just let
13 it grow, the locks naturally. Occasionally they wear
14 socks.15 Q Is Harold Burnell a Rastafarian, to your
16 knowledge?

17 A No.

18 Q Did he tell you whether these three Rastafarians
19 who Buster had ripped off were friends of his?

20 A No.

21 THE COURT: Miss Burch, are you all right?

22 THE WITNESS: May I have some water, please.

23 Q Miss Burch, Harold Burnell was calling you
24 in South Carolina from New York just before his arrest?

25 A Yes.

qp

Burch-cross

598

1 Q Did he ever tell you that he was coming down
2 with a ransom collected for Buster Huggins?
3

4 A No.

5 Q Did Harold Burnell in the beginning of
6 December when he was calling you say anything about his
7 preparing, in fact, his decorating a Christmas tree on
8 or about December 1?

9 A Yes.

10 Q Tell us about it.

11 A Well, when we were down -- when I had gone
12 down in September and he came down we had picked up a
13 Christmas tree and decorations and we had planned to
14 decorate it together, but after I had gone down for my
15 grandfather's funeral I had asked him to wait until I
16 came back and we would decorate it together, but one occasion
17 when he talked to me he said that he was going to surprise me,
18 so I said what, and he said that he put the tree up al-
19 ready.

20 Q He put the tree up in New York?

21 A Right.

22 Q And in your apartment?

23 A Yes.

24 Q And do I take that to mean that it was the
25 plan that he would come down South on Saturday, the 4th,

1 qp Burch-cross 599
2 and that shortly thereafter you two would come back up to
3 New York together?

4 A Yes.

5 Q Because it was a Christmas tree that was set
6 up, right?

7 A Yes. he was going to have his children over
8 for Christmas.

9 Q So that this trip down to see you, which
10 was planned for Saturday, the 4th, or Sunday, the 5th,
11 it was not planned to be a permanent removal down South,
12 is that right?

13 A No, not at that time, no.

14 Q When was it expected that you two would come
15 back up north to New York?

16 A When we planned to move back?

17 Q Yes, when did you come back to New York?

18 A That weekend, that following weekend, Sunday,
19 the following weekend. Because my grandmother was alone at
20 that time since my grandfather died and we had to make
21 arrangements for somebody to be with her until we came
22 back.

23 Q Finally, Miss Burch, if you had heard those
24 tapes you heard today six months ago could you have said
25 whether it was Harold or Arthur speaking on them under

qp

Burch-cross

600

oath?

A Going by sound, I could only say Harold.

Q I don't understand something. In what respect is Arthur's voice so simi' that you think it's Harold when he calls you? Let me put it another way.

If Arthur calls you, you think it's Harold if he doesn't identify himself, is that right?

A Yes.

Q So going by sound do the tapes also sound like Arthur?

A Well, Arthur sounds like Harold.

Q That is what I am asking you, can you tell one from the other? Can you tell one from the other, Miss Burch?

A No.

MR. THAU: Thank you.

THE COURT: Mr. Hochheiser.

CROSS EXAMINATION

BY MR. HOCHHEISER:

Q You lived with Mr. Moore's parents for some time?

A Yes.

Q And you know my client, Vankirk Moore, is that right?

A I know of him, yes.

QP

Burch-cross

601

1 Q When you say you know of him, you have been
2 present when he has been present, is that right?
3

4 A Yes.

5 Q In other words, when you say you know of him,
6 we know of actors in Hollywood, we know of them but we
7 have never met them, that is not the situation with Mr.
8 Moore, right?

9 A I don't know him personally, not personally, no.

10 Q You don't know him well?

11 A No.

12 Q But you have met him?

13 A Yes.

14 Q And you have spoken with him in some fashion?

15 A Yes.

16 Q And you even had, whether positive or negative,
17 feelings, some feelings about him, whether you liked him
18 or didn't like him, isn't that so?

19 A Yes.

20 Q You mentioned some things that you said Mr.
21 Burnell said that Mr. Moore said, if that is not too
22 complicated.

23 Did Mr. Moore ever talk about this subject
24 with you at all?

25 A No, sir.

qp

1 Q Did you ever hear Mr. Moore say anything about
2 a kidnapping?
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4 A I never talked with him about it, no.

5 Q And you never heard Mr. Moore say anything
6 about a ransom, did you?

7 A Not that I recall. I barely understand anything
8 he says.
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MP

Burch - cross

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Q Okay. We will get to that in a second.

I am not trying to trick you in any of this. It is straightforward. I just want to know: is it true that you never spoke to Mr. Moore, never heard Mr. Moore speak about Buster Huggins, money, ransom, extortion, kidnapping, criminal acts against Mr. Huggins; am I right about that? I am sorry. You will have to speak so he can take it down.

A Right.

- And anything that you have said concerning what Mr. Moore is supposed to have said is based on what you say Mr. Burnell said; isn't that so?

A Right.

Q Now, you said that you have trouble understanding Mr. Moore. Could you explain what you mean by that?

A Because of the way he talks.

Q How does he talk?

A Like he's singing.

Q Like he's singing. He has a sing-song characteristic to his voice?

A To me, yes.

Q Are the words also difficult to understand because of the way he pronounces them?

A I guess, yes.

Q I don't want to do the testifying here, but I want

1 MP : Burch - cross

2 to ask you --

3 A I don't understand what he says.

4 Q And do you have to have people interpret what he
5 says for you?

6 A Harold tells me what he says.

7 Q And that would be so even when Mr. Moore is standing
8 in front of you, telling you something --

9 A Like if he speaks to me or something like that,
10 that's all. You know, if he's saying hello to me or some-
11 thing like that. As I said, I don't talk to Tico.

12 Q Now if he were to try and tell you something
13 beyond just hello or how are you, to talk about something,
14 you say that you would not be able to understand him; am I
15 correct?

16 A Right.

17 Q And Mr. Burnell would translate for you? Would
18 you use that term?

19 A Yes.

20 Q And would it be fair to say that Mr. Vankirk Moore
21 -- would it be fair to say that he has more than an accent
22 but actually a dialect?

23 A Well, I guess you could say he talks Rastaferian.

24 Q He talks Rastaferian. And have you had times where
25 he has tried to get you to understand something that he has

1 MP 3 Burch - cross

2 been saying? I will amend that to mean even if he has tried
3 and failed.

4 A Maybe. I don't recall.

5 Q What I am trying to say is this: have you ever had
6 a conversation where before Mr. Burnell or someone else
7 would tell you what Mr. Moore was trying to say, that Mr.
8 Moore himself would try to repeat it or try to make it under-
9 standable to you but without success?

10 A Yes.

11 Q Now, you were asked to listen to a couple of convers-
12 ations of the voice that you said sounded like Harold or
13 sounds like Harold and Arthur or whatever your testimony was
14 was on that subject. Do you recall testifying about that?

15 A Yes.

16 Q Did anyone ever ask you to listen to the tape re-
17 cording of the conversations that the Government in this
18 case, the FBI, the prosecutors for your purposes, claims
19 was the voice of Vankirk Moore?

20 A I heard the other voice, yes.

21 Q And do you know the voice of a fellow by the name
22 of Kojak?

23 A Yes; I've heard him talk.

24 Q That's Kisson Adams. Do you know that person?

25 A I know of him, yes.

- 1 MP 4 Burch - cross
- 2 Q What?
- 3 A Yes.
- 4 Q You have met him; is that right?
- 5 A Yes.
- 6 THE COURT: She said she heard him talk.
- 7 Q Yes. You heard him talk?
- 8 A Yes.
- 9 Q Now, this tape recording that you listened to,
- 10 that was identified --
- 11 MR. HOCHHEISER: Withdrawn.
- 12 Q Did they tell you whom they thought it was --
- 13 that is, the Government -- when they played it for you?
- 14 A Yes.
- 15 Q They told you that that was the voice of Tico
- 16 Moore?
- 17 A Yes.
- 18 Q And did they tell you that before they asked you
- 19 whose voice it was?
- 20 A After.
- 21 Q After. And did you tell them that that voice
- 22 sounded like it could have been Kojak's voice?
- 23 A I said later, some of the things that he said,
- 24 that's what I thought.
- 25 Q Did you have any trouble understanding those tapes

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MP 5

Burch - cross

that they said were Vankirk Moore's tapes?

A I didn't understand all of it.

Q Did you have any trouble understanding those tapes?

A Did I have any trouble understanding?

Q Yes, the voice that they said was Vankirk Moore's voice. Could you hear what the voice was saying?

A Yes; I could make it out.

Q The voice was talking to somebody named Martha?

A Yes.

Q And the voice was talking about money; isn't that so?

A Yes.

Q It was perfectly plain what the voice was talking about to Martha?

A Yes.

Q Now, did you at that time tell them that you could not say whether that was Kojak's voice?

A I told them that I didn't know who that was.

Q May I show you a portion of 3508-B for identification and ask you to look at this. Just read this to yourself.

A I didn't say that.

Q You didn't say that?

A I didn't say it was either Tico or Kojak.

1 MP 6

Burch - cross

2 Q You did not tell agents of the FBI that the voice
3 you heard on that tape was either Tico's or Kojak's?

4 A No.

5 Q Which part or both parts couldn't you say?

6 A What I said was that some of the things sounded
7 like Kojak because of the accent. I told them I don't
8 understand Tico. I don't know if that's Tico's voice or not.

9 Q So that where they stated that the other individual
10 on the tape than Harold Burnell was either Tico or Kojak,
11 according to you that is not true at all, according to what
12 you said; is that right?

13 A Right.

14 Q You never said that you thought that was Tico's
15 voice?

16 A Either, no.

17 Q And in fact you said you didn't understand Tico
18 when he spoke?

19 A Yes.

20 Q And at most what you said was, it sounded like
21 Kojak's accept and Kojak's voice?

22 A Some of the things, I said. I didn't say the whole
23 tape, no.

24 Q Now, did they at that time insist that you must be
25 wrong and ask you to change your opinion?

1 MP 7 Burch - cross

2 A Not that I recall.

3 Q Well, did they just drop it?

4 A They just continued asking me if I was sure in what
5 I was saying, and then they started back to playing Harold's
6 voice.

7 Q And was this in and about the same time that they
8 were telling you about what happens to a girl like yourself
9 if they get you into jail?

10 A No. That was when I was on the polygraph.

11 Q That was when you were on the polygraph they told
12 you those things?

13 A Yes.

14 Q Did that make you calm and relaxed to take that
15 test.

16 A No.

17 Q And so concerning the voice on the tape which was
18 identified as Vankirk Moore's voice, they told you what
19 they thought the truth was; is that right?

20 MR. KAPLAN: Objection. That is not the testimony.

21 THE COURT: Objection sustained.

22 Q Did they tell you whose voice they thought was on
23 that tape?

24 A Yes.

25 Q And did they let you know that --

1 MP 8

Burch - cross

2 MR. HOCHHEISER: Withdrawn.

3 Q You said that they threatened you and they
4 harassed you et cetera; right?

5 A Yes.

6 Q Now, when they did this and they told you that they
7 were not going to settle for anything less than the truth
8 or anything other than the truth, did they also tell you
9 what they thought the truth should should like? In other
10 words, for example, did they tell you that in their opinion
11 a truthful answer concerning whose voice was on the tape was
12 that it was Vankirk Moore's voice?

13 MR. KAPLAN: Objection, your Honor.

14 THE COURT: Sustained.

15 Q By the way, do you know what it was actually that
16 the FBI claims that they found in your apartment?

17 A They said that they found heroin under the rug
18 behind the bed.

19 Q Do you think that they did?

20 MR. KAPLAN: Objection.

21 Q Do you want to go to jail?

22 THE COURT: Just one second. There is a question
23 and a pending objection that hasn't been ruled on yet.

24 MR. HOCHHEISER: I am sorry. Shall I repeat the
25 question?

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MP 9

Burch - cross

THE COURT: Objection sustained.

Q Do you believe the FBI could put you in jail if they wanted to?

MR. KAPLAN: Objection.

THE COURT: Overruled.

A I've been in jail already.

MR. THAU: Your Honor, may we approach the bench?

MR. KAPLAN: I was just thinking the same thought.

(At the side bar:)

MR. THAU: Your Honor, based on an inventory of items seized in Mr. Burnell's apartment, I consider that there was no heroin in the apartment. I think that in fairness, since the apartment to which Miss -- there she goes again.

MR. KAPLAN: I guess we had better let the jury go out.

THE COURT: Yes.

(In open court:)

THE COURT: We will take a recess for the jury.

(The jury left the courtroom.)

MR. HOCHHEISER: Maybe she will feel better if she knows that I am almost finished -- seriously, Judge.

THE COURT: I will see counsel in chambers.

1 MP 10

Burch - cross

2 (In the robing room:)

3 THE COURT: You say you haven't much longer. What
4 does that mean?

5 MR. HOCHHEISER: I thought I could be finished in
6 ten or fifteen minutes -- ten minutes. I know I am not going
7 to keep her up there for another hour or anything like
8 that.

9 THE COURT: Mr. Kaplan?

10 MR. KAPLAN: Twenty minutes to a half our on re-
11 direct.

12 MR. THAU: Your Honor, the inventory served on
13 me by the Government of the stuff seized from Harold Brunell's
14 apartment, which is also Mary Burch's apartment, shows no
15 drugs whatever.

16 Now, based on her testimony, which was that the
17 FBI agents told her that she was liable for possible drug
18 prosecution basdd on what was found under the rug, my man
19 is now being painted as someone who had heroin under the rug
20 in his apartment.

21 MR. KAPLAN: That was your doing.

22 MR. THAU: It wasn't my doing.

23 MR. HOCHHEISER: I was the one who did it.

24 MR. KAPLAN: On Mr. Thau's cross, he brought out
25 that there was a claim that heroin was seized.

1 MP 11 Burch - cross

2 MR. THAU: In fairness, I ought to be able to
3 illustrate, as I did, that she was threatened, and in further
4 fairness I ought to be able to illustrate that there were no
5 drugs and the Government made a consent search.

6 Now, the fact that I elicited the threat doesn't
7 mean that I am now barred from asking for a stipulation in
8 the interests of justice that there w-s no drug.

9 MR. KAPLAN: If Mr. Thau will stipulate with me,
10 since I spoke to the agent at lunchtime, that there was no
11 threat, I will stipulate that there was no drug.

12 MR. THAU: That's not fair, your Honor. He has
13 splken to her considerably longer than I have. I have spoken
14 to her a total of perhaps eight minutes in my life. I
15 certainly did not put in my mough --

16 MR. HOCHHEISER: In fact, I can't remember a
17 case where the FBI or any officer has told someone that they
18 ever made any threats. That means that there are never any
19 or sometimes they don't talk about that.

20 That suggestion would be an anomalous ruling that
21 you could elicit threats from a witness where they were
22 based on the truth, and you could not where they were
23 elicited as a lie.

24 MR. KAPLAN: Mr. Thau can call all of the agents
25 that were involved in the search and bring out that there was

1 MP 12 Burch - cross

2 no heroin.

3 THE COURT: What is it you want?

4 MR. THAU: I want to bring out that there was no
5 heroin in the apartment, either under the rug or anywhere
6 else.

7 THE COURT: No. You are asking Mr. Kaplan to make
8 a stipulation that there were no drugs, and you want that
9 stipulation just to be a simple stipulation which then is
10 predicated upon the evidence that you have elicited that there
11 was a door-to-door search of that room.

12 MR. THAU: No, no. That there was a threat.

13 THE COURT: And a series of threats predicated on
14 their being drugs. I don't think he should be required to do
15 that. If you can work out a more reasonable stipulation, I
16 am sure that Mr. Kaplan will be glad to go along with that.

17 I did not call you gentlemen in here to discuss
18 this. I called you in here to explore whether in the
19 interests of anyone -- I think it would be in the interest
20 of anyone, because, frankly, I don't know in which direction
21 this woman's condition cuts -- to terminate her testimony
22 as quickly as possible.

23 I had hoped we would be able to come up with a
24 lot better than ten or fifteen minutes and twenty or thirty
25 minutes.

1 MP 13 Burch - cross

2 MR. KAPLAN: Your Honor, all I can say is that I
3 will go as expeditiously as I can and drop as much as I feel
4 I can get away without redirect on. I can't do better than
5 that. I will try to do the best I can to keep it as short
6 as I can. I don't want to keep her on the witness stand any
7 longer than I have to.

8 MR. HOCHHEISER: That is very reassuring, and I
9 will give the Court the same assurance.

10 MR. THAU: Me, too.

11 MR. KAPLAN: Your Honor, Miss Burch testified
12 right before she fainted again that she was jailed or
13 arrested, and that has to do with when she was arrested on
14 a material witness warrant, issued in February.

15 I think your Honor should make that clear to the
16 jury so they don't think this is something that happened
17 back in December.

18 MR. HOCHHEISER: I have no objection to that
19 being made clear, either by the Court or anyone else. The
20 reason I did not ask those follow-up questions is because
21 I didn't want her to tell me that she had been arrested in
22 this case. I didn't expect that answer, and I didn't want to
23 be in a position where Mr. Kaplan would be arguing from a
24 follow-up question that I established that she was arrested
25 as a material witness et cetera, and therefore the door is

1 MP 14 Burch - cross

2 open to show why. That is why I didn't ask her anything
3 further, since it would sound like a distant or unrelated
4 arrest, and that's why I thought I would take it up with the
5 Court or Mr. Kaplan before I asked.

6 MR. KAPLAN: Your Honor, I certainly won't get into
7 the fact that she was arrested on a material witness warrant.
8 Once she leaves the stand, your Honor can inform the jury
9 that she was arrested on a material witness warrant.

10 MR. HOCHHEISER: I have no objection to that. I
11 just did not want to undertake it myself. I didn't want him
12 to say I was asking questions about it.

13 THE COURT: This will be after she is finished
14 testifying.

15 MR. KAPLAN: After she is finished.

16 While we are talking about threats, is your Honor
17 going to allow me to elicit the telephone call that she made
18 in February or not?

19 THE COURT: You better tell me something about the
20 circumstances of it. I must say I spoke too hastily in court
21 when I responded "absolutely" to your suggestion that the
22 fact that they were being permitted to go into the area of
threats would permit you to go into the area of threats.

Through the testimony they have identified the
people that they allege made the threats. From the short

1 MP 15 Burch - cross

2 offer of proof at the side bar, I gather that there is nothing
3 in the threats that she received that ties them in in any way
4 with the defendants.

5 MR. KAPLAN: Other than the simple fact of who else
6 would be threatening her not to come back to New York?

7 It's simple to understand that she has been threat-
8 ened by the defendants. Who else wouldn't want her back here
9 to testify? I think that's a reasonable inference. The
10 caller didn't identify himself, of course. He simply said,
11 "Mary, don't come back to New York. You and your family will
12 be in danger.

13 MR. HOCHHEISER: Both our clients were in jail.

14 MR. THAU: Your Honor, she said she didn't recog-
15 nize the voice.

16 MR. HOCHHEISER: It could have been Kojak.

17 MR. THAU: Furthermore, we know nothing about the
18 rest of this young lady's life, and you will notice that
19 Mr. Kaplan has made two offers of proof and an affidavit,
20 and none of the three presentations suggests that the threat
21 has anything whatever to do with her prospective testimony.
22 Who knows but that she may have another lover sitting some-
23 place?

24 THE COURT: Well, I really think that testimony of
25 anonymous threats, that admitting testimony of that would be

1 MP

Burch - cross

618

2 so prejudicial that I can't think of anything that would be
3 probative enough about it to justify its admission, so I
4 will not permit that sort of inquiry, Mr. Kaplan, and I don't
5 think you are really seriously urging it -- I am sure you are
6 seriously urging it but not vigorously urging it.

7 MR. KAPLAN: I will abide by your Honor's ruling,
8 of course, whether I seriously urge it or not. We all can
9 hope every once in a while.

10 THE COURT: I really think we should try to finish
11 with this witness this afternoon, and I further think that
12 she then should be sent back home.

13 MR. KAPLAN: Yes, your Honor. I would ask your
14 Honor that as soon as she finishes testifying, that that be
15 done, that your Honor exonerate the bail. She is not in
16 custody. She is in protective custody, because she requested
17 it, not because she couldn't make the bail.

18 MR. THAU: She put up \$25,000?

19 MR. KAPLAN: Bail. They put up the property in
20 South Carolina.

21 MR. HOCHHEISER: You go after me, so I can't con-
22 trol you, but I will do everything I can to shorten the
23 examination, if you will do the same.

24 THE COURT: Mr. Thau, before you leave, I just want
25 to be sure we agree on this:

MP

Burch - cross

619

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2 It is my inclination to send the witness back home,
3 to release her and send her back home. Now, it may be that
4 there will be some development later in this trial where
5 either the Government or the defendants will feel it necessary
6 or at least helpful to have her back again, and it may be that
7 she will not be back.

8 I want to be sure that in agreeing to this we
9 realize that that is a possibility.

10 MR. THAU: Your Honor, in the event we should need
11 her again, I am sure that the Government, which was so dili-
12 gent and effective in getting her up here, can do it again,
13 for our benefit. But other witnesses may spring something
14 on us which will require her testimony on rebuttal.

15 MR. HOCHHEISER: You can keep the material witness
16 order in effect until after the whole trial. That is just a
17 suggestion. For myself, I really see no need.

18 MR. THAU: I can't, either.

19 I really think, however, there is a possibility of
20 it.

21 MR. KAPLAN: Your Honor, I am sure there will be
22 no need to re-arrest her. If she is required to come back,
23 she will come back.

24 THE COURT: I am sure she is under a terrible
25 emotional stress. The sooner she returns to South Carolina,

1 MP Burch - cross/redirect 620
2 (In open court:)
3 THE COURT: Miss Burch, do you feel well enough to
4 continue now? I don't believe it will be too much longer.
5 THE WITNESS: Yes.
6 (Jury in box:)
7 THE COURT: Mr. Hochheiser?
8 MR. HOCHHEISER: I think, your Honor, if I may
9 hear the last question --
10 THE COURT: Mr. Stanographer, will you read the
11 last question and answer.
12 (Record read.)
13 MR. HOCHHEISER: That's all. I have no further
14 questions.
15 REDIRECT EXAMINATION
16 BY MR. KAPLAN:
17 Q Do you love Harold Burnell, Miss Burch?
18 A Yes.
19 Q The jury couldn't hear that.
20 A Yes.
21 Q Now, you didn't tell the agents who interviewed
22 you down in South Carolina about this conversation you had
23 with Mr. Burnell in November; is that correct?
24 A Yes.
25 Q Was that because you were trying to protect Mr.

1 MP Burch - redirect 61

2 Burnell?

3 A I didn't want to be involved. I didn't want any
4 thing to do with it.

5 Q And was that the same reason why you didn't tell
6 the agents up in New York about this conversation initially
7 when they first started asking you questions?

8 A Yes.

9 Q Did you have that conversation with Harold Burn
10 that you testified to?

11 MR. THAU: That was asked on direct and answered
12 your Honor.

13 THE COURT: I think it is clear that she did have
14 the conversation. She did so testify on direct.

15 MR. THAU: Your Honor, I take exception to the
16 characterization that it is clear that she testified that
17 she had the conversation.

18 THE COURT: All right. I will withdraw the
19 characterization.

20 Q Are you sure that you told the FBI agents, when
21 spoke with them in December, that Arthur Burnell and Harold
22 Burnell sounded alike on the telephone?

23 A I mentioned that in New Rochelle.

24 Q I can't hear you.

25 A I mentioned it at New Rochelle.

MP

Burch - redirect

622

Q Isn't it a fact that you first mentioned that Arthur Burnell and Harold Burnell sounded alike, last Monday to Mr. Farkash?

A I'm sure I mentioned it at New Rochelle, because they told me that they were not interested in Arthur.

Q When did you start talking with Arthur Burnell on the phone?

A Back in -- as far back as I can remember, since I started living with Harold.

Q The tapes you heard this morning: was the voice on those tapes Arthur Burnell or Harold Burnell?

A Like I said, it sounds like Harold.

Q Now, you told Mr. Thau on cross-examination that Mr. Harold Burnell said that it wasn't him on those tapes. Do you remember that? Do you remember telling Mr. Thau that?

A Yes.

Q Did you then tell Mr. Harold Burnell during that conversation that you had admitted that it was him on those tapes?

A Yes.

Q And did Harold Burnell then tell you, "Well, that's what they've got on me"?

A Yes, because I had told him that it was his voice.

Q So Mr. Harold Burnell admitted that it was his

1 MP Burch - redirect

623

2 voice on the tape?

3 MR. THAU: Objection.

4 THE COURT: Sustained.

5 MR. THAU: That is Mr. Kaplan's interpretation.

6 THE COURT: Mr. Thau, I have asked you merely to
7 make the objection and stand on the objection.

8 I have sustained the objection.

9 Q Miss Burch, do you remember when you testified
10 before the grand jury?

11 A Yes.

12 Q Do you remember that a lawyer was appointed to
13 represent you?

14 A Yes.

15 Q Do you remember being advised of your right to re-
16 main silent? Do you remember that?

17 A I don't understand what you are saying.

18 Q Do you remember being told that you had certain
19 rights as a witness before the grand jury?

20 A Yes.

21 Q Do you remember being told that you had a right
22 to remain silent?

23 A Before the grand jury?

24 Q Yes.

25 A No.

1 MP Burch - redirect 624

2 Q Do you remember being asked this question and
3 giving this answer --

4 MR. THAU: Page, please?

5 MR. KAPLAN: Page 30.

6 Q (Continuing) "Q Let me tell you what your rights
7 are before the grand jury. In the first place, you have an
8 absolutely right under the Constitution to refuse to answer
9 any question if the answer to that question might tend to
10 incriminate you personally in any way, shape or form. Do
11 you understand that? You will have to speak up.

12 "A Yes."

13 Do you remember being asked that question and making
14 that answer?

15 A Yes.

16 Q Do you remember being told that anything that you
17 said before the grand jury could be used against you in a
18 court of law?

19 A Yes.

20 Q Do you remember being told that you had a right
21 to consult with an attorney of your choice before you answered
22 any questions?

23 A Yes.

24 Q And did you in fact consult with an attorney prior
25 to answering any questions in the grand jury?

1 MP Burch - redirect 625

2 A I don't recall.

3 Q Do you remember an attorney by the name of Hudson

4 Reid?

5 A Yes.

6 Q Do you remember talking with him outside of the

7 grand jury room before you went in to testify?

8 A Yes.

9 Q Did you testify to the truth in the grand jury?

10 A To my best recollection, yes.

11 Q Were you threatened while you were in the grand

12 jury?

13 A Not that I recall.

14 Q Were you harassed while you were in the grand jury?

15 A I felt the whole situation was harassment.

16 Q The whole situation surrounding the arrest of

17 Harold Burnell?

18 A Excuse me?

19 Q The entire situation surrounding the arrest of

20 Harold Burnell?

21 A With me, yes.

22 Q But the question is, did anyone harass you in the

23 grand jury?

24 A No.

25 Q You told Mr. Thau on cross-examination that Mr.

MP

Burch - redirect

626

Harold Burnell said he would not be involved in the kidnapping of Buster Huggins; is that correct?

A Yes.

Q Was Mr. Burnell going to share in any ransom money which was gained from that enterprise?

A I -- I -- I don't know. The only thing that I know is that the money would be divided. I don't know --

Q Divided between Mr. Burnell and Mr. Moore?

A I don't know.

Q I didn't hear the answer.

A I don't know. I can only assume on that. I don't know.

MR. THAU: Objection and move to strike.

THE COURT: It will be stricken from "I can only assume".

Q Do you recollect being asked this question and giving this answer in the grand jury?

MR. KAPLAN: Page 55.

Q (Continuing) "Q Harold Burnell was supposed to get half of the proceeds that were realized from the ransom that was paid; is that correct?

A I think he said half, yes.

Q And Tico was supposed to get the other half?

A Yes."

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Burch - redirect

627

Do you remember being asked those questions and
giving those answers?

MR. THAU: Objection. Not proper redirect.

THE COURT: Overruled.

A. Like I said, I think --

Q. Do you remember being asked those questions?

A. Yes.

jqrl

Q Do you remember Mr. Burnell telling you that his only involvement was his voice on the tapes?

A No. I don't recall that.

Q Do you remember being asked these questions and giving these answers in the grand jury, page 52:

"Q You told him that you heard his voice on the tape?

"A Yes.

"Q What did he say in response to that?

"A If I remember correctly he said he asked me if I said that. He asked me if I admitted, you know.

"Q That it was his voice?

"A Yes.

"Q What did you tell him?

"A Because at first it sounded very heavy to me. I told the agents it was very heavy -- it was heavy. And finally I told them it was Harold's voice. I told him I admitted it was his voice. He said the only involvement he had was the voice."

Do you remember being asked those questions and giving those answers?

A Not all of those answers.

Q Let me show you page 52 of Government's Exhibit 3508E and ask you if it refreshes your recollec-

1 jqr2 Burch-redirect
2 tion.

3 MR. THAU: I ask line 17 through 20 be
4 included as proper context to what he just read.

5 THE COURT: Do you have any objection to
6 Mr. Thau's suggestion that line 17 through 20 be added
7 to what she is being asked about?

8 MR. KAPLAN: Yes, your Honor. I will hand
9 it to the Court.

10 THE COURT: I think they should be read.

11 MR. KAPLAN: Very well, your Honor.

12 Q Do you also remember being asked the
13 following question and giving the following answer:

14 "Q He told you his only involvement was making
15 certain phone calls?

16 "A He didn't say making certain phone calls.
17 He just said tape."

18 A No.

19 Q You don't recall making that statement
20 either?

21 A No.

22 Q And you don't recall the previous statements?

23 A No.

24 MR. KAPLAN: No further questions.

25 THE COURT: Do you have anything further,

1 jqr3 Burch-redirect-recross

2 Mr. Thau?

3 MR. THAU: No, your Honor.

4 THE COURT: Mr. Hochheiser?

5 MR. HOCHHEISER: I have one question, your
6 Honor.

7 RECROSS-EXAMINATION

8 BY MR. HOCHHEISER:

9 Q Now, Miss Burch, Mr. Kaplan just before
10 these questions read to you certain rights and asked if
11 you had been given them in the grand jury, do you
12 remember him just doing that; do you remember what I am
13 talking about?

14 A I didn't hear you.

15 Q Mr. Kaplan asked you at the beginning of this
16 last question that he did whether you received certain
17 rights, do you remember, about consulting with an
18 attorney and all of that?

19 A Yes.

20 Q Miss Burch, did you actually sit down and
21 consult with this attorney?

22 MR. KAPLAN: Objection.

23 THE COURT: Objection sustained.

24 Q Miss Burch, did you choose this attorney?

25 MR. KAPLAN: Objection, your Honor. May we

1 jqr4 Burch-recross

2 approach the side bar?

3 THE COURT: Yes.

4 (At the side bar)

5 MR. HOCHHEISER: May I just perhaps
6 explain what I am doing.

7 Mr. Kaplan in his redirect asked her among
8 other things if she didn't have an attorney by the name
9 of Hudson Reid assigned and didn't she talk to him,
10 etc., and put into the record what appeared to be state-
11 ments by the witness that she was assigned this lawyer,
12 she consulted with him, etc., and that as against
13 threats, intimidation and this kind of atmosphere.

14 When she was answering I noticed a rather
15 striking hesitancy on her part and it struck me what she
16 was really thinking when she was being asked did she
17 speak with the attorney, I got the impression in her
18 own mind she really didn't think she did.

19 I thought I would explore that with one or two
20 questions.

21 MR. THAU: Mr. Kaplan took great pains, your
22 Honor, to read the Miranda warnings emphasizing an attorney
23 of your own choice. It happens that Hudson Reid was
24 assigned and not the lawyer of her own choice. She
25 might have chosen him independently.

jqr5

Burch-recross

Q She was entitled to a lawyer?

MR. KAPLAN: She could not afford an attorney of her own choice and an attorney was appointed.

MR. HOCHHEISER: You didn't read that.

MR. KAPLAN: I will read that.

MR. HOCHHEISER: It's my turn now.

THE COURT: It seems to me we are dwindling down here to trivia. I am sure that there can be a stipulation among attorneys that Mr. Reid did not accompany Miss Burch into the grand jury room.

MR. HOCHHEISER: Why can't I take it in the form of testimony? If there is going to be a full stipulation that is fine.

MR. KAPLAN: I don't want to be put in the position of having Mr. Reid recalled as a witness to testify that he talked about this case with Miss Burch and consulted with her for an hour and sat outside the grand jury room.

MR. HOCHHEISER: Did they?

MR. KAPLAN: Yes, for at least a half hour and they discussed it and I don't want to put Mr. Reid in the position of having to bring him in to rebut what she says but I have to if the testimony leads where it leads.

1 jqr6

Burch-recross

2 MR. HOCHHEISER: I am not concerned with Mr.
3 Reid's position. I want to know what this witness
4 was thinking about what went on there in the grand jury.

5 MR. KAPLAN: I object to it, It's far
6 afield.

7 THE COURT: It is far afield and I am hoping
8 you will keep it very limited.

9 MR. HOCHHEISER: Very limited, Judge.

10 (In open court)

11 Q This attorney, how many times did you meet
12 him?

13 A Once.

14 Q Was that at the time you testified in the
15 grand jury?

16 A Yes.

17 Q May I correctly assume that as the law
18 requires he didn't go into the grand jury room with
19 you, is that right?

20 A No.

21 Q He was outside the grand jury room so that
22 you could come out and consult with him, is that right?

23 A Yes.

24 Q Do you remember his name?

25 A Reid.

1 jqr7

Burch-recross

2 Q Do you remember his first name?

3 A Hudson Reid, I think.

4 Q How long did you spend with him?

5 A Not very long because when he got downstairs
6 where I was it was almost time to go upstairs so I didn't
7 talk to him that long.

8 Q Did you choose this lawyer?

9 A No, I didn't.

10 Q Do you know who did?

11 A Someone in the magistrate's office called him,
12 I think.

13 Q He was assigned by the Court from a panel,
14 so far as you know, is that right?

15 A Yes.

16 Q In addition to the rights and privileges
17 that Mr. Kaplan read to you did he also read to you
18 the following, referring to page 31:

19 "Finally, I want to advise you that you are
20 now under oath and therefore if you wilfully or
21 deliberately tell a lie to the grand jury or if you are
22 evasive or misleading or if you fail to answer questions
23 which are properly put to you you subject yourself
24 to possible prosecution for the crimes of perjury,
25 obstruction of justice and contempt."

1 jqr8

Burch-recross

2 Did he ask you that question too?

3 A YOU mean Mr. Kaplan in the grand jury?

4 Q Yes.

5 A Yes, I think so.

6 Q And that was the last thing he said to you
7 before he asked the first question in the grand jury?

8 MR. KAPLAN: Objection.

9 THE COURT: Objection sustained.

10 Q And where was your lawyer when he told you
11 that?

12 MR. KAPLAN: Objection.

13 THE COURT: Objection sustained.

14 MR. HOCHHEISER: No further questions.

15 THE COURT: Anything further, Mr. Kaplan?

16 MR. KAPLAN: No, your Honor.

17 THE COURT: Thank you, Miss Burch.

18 (Witness excused)

19 THE COURT: Ladies and gentlemen of the
20 jury, we will very shortly adjourn for the night. The
21 is a stipulation which was entered into between the
22 attorneys which will be read to you.23 MR. KAPLAN: If we might put the entire
24 question of the stipulation until tomorrow morning, there
25 is one question that counsel have to resolve. I would

1 jqr9

2 only ask that your Honor inform the jury about the other
3 matter that we discussed.

4 THE COURT: All right. There was reference
5 in the testimony of Miss Burch to the fact that
6 she had been in jail and we have agreed that the jury
7 should be informed that that was not with respect to
8 any crime that was charged against Miss Burch but it
9 was in connection with her testimony as a material
10 witness in this case.

11 We will adjourn until tomorrow morning
12 at 10 o'clock. Thank you and goodnight.

13 (The jury left the courtroom)
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L U C I L L E H U G G I N S, called as a witness
by the government, being first duly sworn,
testified as follows:

DIRECT EXAMINATION

BY MR. KAPLAN:

Q Mrs. Huggins, where do you live?

A Charleston, South Carolina, 1218 Gun Avenue.

Q Do you have a telephone?

A Yes. 555-6729.

Q And is that Area Code 803?

A Yes, sir.

Q And what do you do for a living?

A I work at the Medical University.

Q What do you do there?

A I'm a maid.

Q Are you married?

A Yes.

Q What is your husband's name?

A Buster Huggins.

Q Do you have any children?

A Nine kids.

Q And what is the name of your oldest child?

A Buster Huggins. Henry Buster Huggins.

Q Junior?

1 mpp8

L.Huggins-direct

2 A Junior, right.

3 Q And how old is Buster Huggins, Jr.?

4 A Well, he's turned 40 on his birthday.

5 Q And when was that?

6 A That was November.

7 Q November. Now, let me show you Government's
8 Exhibit 40, already received in evidence, and ask you if
9 you recognize the person shown in that photograph.

10 A That's my son.

11 Q That's your son Buster?

12 A Yes.

13 Q And you sometimes refer to your son Buster as
14 Buster, Jr.; is that right?

15 A Yes.

16 Q Now, let me direct your attention to Wednesday
17 night, December 1, 1976. Do you recall receiving a
18 telephone call on that evening?

19 A I was in bed, and my son called me, and he
20 said, "Mom, phone."

21 Q Which son is that?

22 A I call him Ira, but we call him Cootchie.

23 And I picked up the phone, and the operator said, "There's
24 30 cents more," and this young man came on the phone,
25 and he says, "Mrs. Huggins, I got your Buster kidnapped,

1 mpp9

L.Huggins-direct

887

2 your son kidnapped, and I'm asking for a quarter of a
3 million dollars, if you would like to see your son alive
4 again."

5 And then Buster came on the phone and he
6 said, "Mom," he said, "do what these men say."

7 And then he came back, this man came on the
8 phone, and he said, he said, "Ms. Huggins, I will get back
9 to you and let you know when I want Mr. Huggins and
10 Martha to meet me at the garage at 4 o'clock on Friday."

11 Q About what time did you get that call?

12 A It was between 9.30 and something to 10.
13 I didn't look directly at the clock, because I was in
14 bed. And I haven't heard from him since.

15 Q You haven't heard from Buster since?

16 A No.

17 Q You received that call in your home down in
18 South Carolina; right?

19 A Yes, sir.

20 Q Now, could you describe the voice of the man
21 who spoke on that call, other than your son Buster?

22 A It was a heavy-voiced man.

23 Q A heavy-voiced man?

24 A Yes.

25 Q Did he have any kind of accent?

mpp

L.Huggins-direct

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A He had a Southern accent.

Q After you got this call, did you do anything about that quarter of a million dollars that was asked for?

A Yes. Samuel came in right after.

Q Samuel is another son?

A Samuel is another son.

And I said, "Samuel, something happened to Buster." I said, "Get to the phone and call Martha and see if Martha knows where he is at or knows where they can locate him."

And I sent Sam up to New York the next day, because I don't know anything about New York, to try to locate Samuel -- I mean, Buster.

Q Did you do anything about getting the money that was asked for?

A Well, my husband and I mortgaged his car and his truck for \$3000.

Q And did you send that up to Samuel?

A I sent it up by Western Union, because Samuel left the night before.

Q And you never heard from these people again, did you?

A No. I never heard from those people again.

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L.Huggins-direct

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Q You never heard from Buster again?

A No.

MR. KAPLAN: No further questions.

CROSS EXAMINATION

BY MR. THAU:

Q Mrs. Huggins, my name is Roland Thau. I represent Mr. Burnell.

A Yes.

Q Mrs. Huggins, have you been up to New York before?

A Yes. I was here, but a long time ago. I don't know anything about New York. I still don't know how to get around, even now.

Q Do you know if we are on the same time zone as South Carolina?

A I beg your pardon?

Q Do you know whether we are on the same time zone? In other words, when it is 5 o'clock here in New York, is it also 5 o'clock in your home in South Carolina, or is it a different time?

A I don't know if it's the same as the time here or not.

Q It is the same time?

A It is?

1 mpp L.Huggins-cross 890

2 Q I am sorry. I thought you were telling me.

3 A I don't know.

4 Q You don't know?

5 MR. KAPLAN: Would your Honor take judicial
6 notice that it is the same time?

7 THE COURT: All right.

8 Q Mrs. Huggins, which one of your sons is it
9 who called you to the phone?

10 A Ira.

11 Q I am sorry?

12 A Ira. I-r-a. Ira.

13 THE COURT: Ira.

14 MR. THAU: Oh, Ira.

15 Q And this is on what date?

16 A On Wednesday.

17 Q Did Ira tell you that the caller had told him
18 anything unusual, or did he just say, "Mama, here's a phone
19 call for you"?

20 A He said, "Mom, here's a phone call," and he
21 was on the phone, too.

22 Q He was on one extension, and you were on
23 another?

24 A Yes.

25 Q I see. And you told us everything that this

mpp

L.Huggins-cross

891

voice on the phone told you; right?

A Yes.

Q And how long would you say this person spoke to you?

A Well, I presume from between 10, after the operator getting things straightened out, and I started speaking to him, 10 minutes.

Q Excuse me, Mrs. Huggins. Did you get in touch with the FBI as soon as this phone call came in?

A My husband got in touch with his lawyer, and his lawyer got in touch with Buster's lawyer up here, and they got in touch with the FBI.

Q Do you know who's Buster lawyer up here was?

A I don't know his lawyer.

Q And do I take it that there came a time when the FBI contacted you?

A I beg your pardon?

Q Did the FBI contact you?

A Later on, the FBI came and brought the tapes at the house and asked me if I could identify the voice. That was long before I came here.

Q But isn't it so, Mrs. Huggins, that the FBI came to see you before bringing the tape? In other words, the time they brought the tape was not their first visit?

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L.Huggins-cross

892

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A I don't remember.

Q I'm sorry?

A I don't remember if the FBI came to me before.

Q Do you remember whether on Thursday, December 2nd, the FBI spoke to you in Charleston?

A I don't recall the date, what date the FBI was to my house, other than the one that was there and spoke to me.

Q You remember the phone call you took was on a Wednesday; is that right?

A On a Wednesday, yes.

Q Now, do you remember if it is not the very next day that FBI agents came to speak to you?

A I think the FBI came to me or called me on the phone, I remember, and was asking me -- from here, I believe, was asking me some questions concerning Buster and the phone call.

Q So the very next day you spoke to Buster on the telephone but you didn't see him personally? Is that what you are saying?

A I think so.

Q How long would you say this conversation took between you and the FBI agents on the first contact over the telephone?

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L.Huggins-cross

893

1 A I would say it take about ten minutes.

2 Q Now, did the FBI agents ask you if the voice
3 you had heard on the telephone was known to you?

4 A Known to me? If I could identify him?

5 Q Yes.

6 A Yes.

7 Q What did you tell him?

8 A I said yes, I could identify the voice.

9 Q You were talking about Buster's voice?

10 A No. I wasn't talking about Buster's voice.

11 Q You were talking about the other voice on the
12 telephone? Maybe I didn't make myself clear. Let me
13 rephrase the question.

14 You had spoken to two men on Wednesday on
15 the telephone.

16 A I didn't speak to two men on Wednesday.

17 Q When Ira gave you the phone, isn't it so that
18 one man told you that Buster had been kidnapped, and then
19 Buster got on the phone also? Right?

20 A Buster got on the phone, yes. They let
21 Buster come on the phone after, and he said, "Mom,
22 do as the man says," and I haven't heard from him since.

23 Q Now, you recognized Buster's voice, didn't
24 you?
25

1 mpp

L.Huggins-cross

894

2 A Of course. That's my son.

3 Q Now, did you recognize the other person's
4 voice as a voice with which you were familiar, perhaps
5 someone you knew or had spoken to before?6 A I have recognized the voice who called me
7 that night on the phone.

8 Q You remember that voice?

9 A Yes. I always will remember that voice as long
10 as I live.11 Q Now, my question, Mrs. Huggins, is not whether
12 you will remember it from now on. My question is whether
13 when you heard it, you recognized it as someone whom you
14 had ever heard before.

15 A No. I never heard no voice like that before.

16 Q Now, when the agent spoke to you the next day,
17 did he ask you what I just asked you, which is, did you
18 recognize the voice of this caller who was threatening you?
19 Did they ask you this?

20 A Did the agent ask me?

21 Q Yes.

22 A Yes.

jqrl

L. Huggins-cross

895

1
2 Q And you told him no, right?

3 A I told him no, I didn't recognize the voice.
4 I didn't tell him I didn't recognize the voice, I didn't
5 tell him no.

6 Q Did the agent ask you to describe the
7 voice in any way?

8 A I don't know.

9 Q I am sorry? He did not?

10 A When it was on the tape he asked me that, if
11 I could recognize the voice. When it was on the tape
12 he asked me that.

13 Q Mrs. Huggins, you did not listen to a tape
14 the very day after you took the phone call, is that
15 right?

16 A No.

17 Q That didn't come until later on?

18 A Yes.

19 Q In fact, would you agree with me that that
20 came around December 9, maybe, a week, a little
21 more than a week later?

22 MR. KAPLAN: January 18.

23 Q January 18, a month and a half later.

24 A About the tape?

25 Q Yes.

1 jqr2

L.Huggins-cross

2 A Do I recognize the voice then?

3 Q Let me rephrase it.

4 Isn't it so --

5 A You mean after he called me and asked me
6 about the voice, if I would recognize the voice?

7 Q No. Forget about any question I have
8 asked you so far and let me ask you another question.

9 When is the first time that a tape was
10 played for you?

11 A I don't remember the specific date. It
12 was a little before I came here. I came about a couple
13 of weeks before I came here.

14 Q The middle of January?

15 A I guess so.

16 MR. THAU: Your Honor, it's stipulated
17 that January 18 is the date on which Mrs. Huggins first
18 listened to a tape in this case.

19 Q Let's go back to early December, Mrs. Huggins.
20 Before you listened to a tape did agents ever ask you to
21 describe the voice of the man who was threatening you?

22 A If the agent asked me that?

23 Q I am sorry.

24 A I don't remember.

25 Q I am sorry?

1 jqr3

L.Huggins-cross

2 A I don't remember that.

3 Mrs. Huggins, on that evening when you
4 received the phone call, aside from Buster were there
5 two voices on that phone or just one?

6 A It was one voice at the time that spoke to
7 me and the voice was in the background where they maybe
8 from the phone booth where they was talking from.

9 Q Did Ira tell you, Mr. Huggins, that the
10 voice of this unknown caller was known to him?

11 A No.

12 Q Was there anybody else in your family or in
13 your household who also listened in on the call as Ira
14 did?

15 A No, because just me and Ira was home at the
16 time and the rest of the kids was in bed and
17 Samuel came after.

18 Q The tape that you listened to, was that
19 a tape played for you in South Carolina or did you come
20 up to New York on that occasion?

21 A Pardon? What did you say?

22 Q Do you remember when you listened to the
23 tape, did you come up to New York to hear the tape
24 or did you hear it down in South Carolina?

25 A I heard it down south.

1 jqr4

L.Huggins-cross

2 Q Did the agents tell you that the two men
3 had been arrested in connection with Buster's
4 disappearance?

5 A No, sir.

6 Q They didn't tell you this?

7 A Yes, two men arrested.

8 Q They told you this?

9 A Yes.

10 Q Did they give you the names of these two men?

11 A No. No, not on that, no.

12 Q And did they play tapes for you?

13 A Yes. They played tapes.

14 THE COURT: Will you speak louder, Mrs.

15 Huggins? There are jurors here and they have to hear
16 you.

17 A Yes, they played the tape.

18 Q Did the agents tell you that they wanted
19 you to compare certain tapes with each other?

20 A Yes, he played several tapes for me to
21 try to compare the voice, if it was the same voice that
22 called me on the phone. He did.

23 Q Did the agents tell you that they had
24 certain tapes which they were going to play for you
25 which had been made voluntarily by Harold Burnell and did

1 jqr5

L.Higgins-cross

2 they ask you to compare those voluntary tapes to the
3 tapes made of the telephone calls?

4 MR. KAPLAN: Objection, your Honor.

5 THE COURT: Come to the side bar, gentlemen.

6 (At the side bar)

7 MR. KAPLAN: Mr. Thau is now attempting to
8 set up whether there was a lineup of the tape.

9 MR. THAU: Not at all.

10 MR. KAPLAN: As he knows from the 3500
11 material when the tape was played in South Carolina
12 according to the agent's report she identified Tico's
13 voice. When the tapes were played in my office she
14 identified Burnell's voice which is why I didn't ask her
15 to make a voice identification.

16 MR. HOCHHEISER: I don't understand that.
17 She identified the same voice differently?

18 MR. KAPLAN: She identified the conversations,
19 the Tico conversations in South Carolina and in my
20 office: she identified the Burnell conversations which the
21 other people will have identified.

22 MR. THAU: Differently.

23 THE COURT: I want to know what the purpose
24 of this examination is.

25 MR. THAU: On January 14 --

1 jqr6

L.Huggins-cross

900

2 MR. KAPLAN: 18.

3 MR. THAU: 14. Harold Burnell voluntarily
4 gave --

5 MR. KAPLAN: You mean December.

6 MR. THAU: Yes. He voluntarily gave voice
7 exemplars which were taped over a telephone. I was
8 present, Mr. Kaplan was, FBI agents --

9 MR. HOCHHEISER: I was present.

10 MR. THAU: What I am trying to elicit from
11 this witness is whether on January 18 or so when the tapes
12 of the actual phone calls were played for her she was also
13 asked to listen to the voluntary tapes made so that --
14 and whether she was asked whether the man speaking on the
15 voluntary tape is or is not the same voice as she heard
16 on the telephone.17 THE COURT: You are obviously not trying to
18 impeach her direct testimony. She didn't testify to
19 this on direct.

20 MR. THAU: It's cross.

21 THE COURT: It's way beyond the scope of
22 direct so there has to be some other reason.23 MR. THAU: That is the reason. I am
24 being candid with you, your Honor. I understand what
25 you mean. There has to be some other reason for me to be.

jqr7

L.Huggins-cross

901

permitted.

THE COURT: Right.

MR. THAU: I thought you meant I was trying to fool you somehow.

THE COURT: No. It's not for impeachment and it's outside the scope of the direct. I just don't see that this is permissible.

MR. THAU: Can I adopt her as my own witness for that purpose? I hate to bring an elderly lady like this, the mother of the victim, up from South Carolina or prolong her stay up here just to ask her that.

MR. KAPLAN: To call those exemplars voluntary is a matter of opinion. Rather than being called to the grand jury the defendants said they would come to my office and if that is voluntary you can call it that. The exemplars went to Washington for the spectrograph examination. They were never sent to South Carolina. She heard only the tapes.

THE COURT: I think under those circumstances then this is not a permissible line of examination.

MR. THAU: I will just about be finished. I am going to look into the aspect first discussed by Mr. Kaplan as to misidentification.

1 jqr8

L.Huggins-cross

902

2 MR. HOCHHEISER: You said she identified
3 a voice as Tico Moore.

4 MR. KAPLAN: The tapes were sent to South
5 Carolina, both Government Exhibit 1 and 2.

6 MR. HOCHHEISER: Containing both
7 people.

8 MR. KAPLAN: Exactly, as heard in court.
9 They were played for her. The report of the agent
10 reflects that in both of those she identified the
11 second call as being the call of being the voice of the
12 caller that spoke with her, that is Mr. Moore's voice so we
13 contend.

14 I played the tapes for her in my office when
15 she was there three weeks ago, two weeks ago, and she
16 identified the voices, the callers we allege to be
17 Mr. Burnell's voice as being the voice of the
18 caller that she spoke to and she said it wasn't a
19 man with a West Indian accent.

20 I played the tape through and she picked
21 Burnell's voice and not Moore and down there she picked
22 Moore and not Burnell, I guess.

23 MR. THAU: Can we ask you whether you
24 apprised her of the different identification she
25 made in South Carolina?

jqqr9

L.Huggins-cross

903

1 MR. KAPLAN: I didn't apprise her of
2
3 anything. I simply played the tape and let her
4 identify it.

5 MR. HOCHHEISER: This was in the 3500
6 material?

7 MR. KAPLAN: Yes. Because the agent's
8 repo-t indicates that she picked the second conversation
9 on both tapes and the notes from my interview with her
10 indicates that she picked Burnell so it was fully dis-
11 closed to you, sir.

12 MR. HOCHHEISER: I hadn't seen it.

13 MR. THAU: I am going to have to try to
14 elicit that, your Honor.

15 THE COURT: I don't see why. I don't
16 see what in the world that has to do with her direct
17 examination.

18 MR. THAU: If she says right here that the
19 man had a southern accent and at sometime in the future she
20 identified as the caller someone who has a marked Island
21 or West Indies accent --

22 THE COURT: I am not going to permit you
23 to show that she once identified his man and as a
24 matter of fact I won't let you go into this area at all.
25 It doesn't have anything to do with direct.

jqrl0

L.Huggins-cross

904

1 MR. HOCHHEISER: She did make a statement
2
3 from the stand and Mr. Thau was not anticipating it
4 because he knew that she had been put on to make an
5 identification and when he asked her if they recognized
6 the voice she voluntarily in front of the jury said that
7 she identified the voice so he is really now in a position
8 where he has to disabuse them of that.

9 When I heard it myself I thought that what
10 she was sayin- and what she did say was that she had
11 made an identification which the witness thinks is
12 correct, I suppose and which the jury probably thinks
13 was a correct identification. I didn't at that
14 time realize why Mr. Kaplan didn't bring it out on
15 direct.

16 THE COURT: It does seem to me that both
17 you and Mr. Thau should have anticipated that there must
18 have been a very good reason why he didn't bring it
19 out. And I certainly do not think that in a criminal
20 trial a defendant on cross-examination can ask questions
21 which then open up whole new lines of permissible inquiry
22 to them when they are beyond the scope of direct unless
23 those questions have to do with something that impeaches
24 the credibility of the witness in one way or another.

25 MR. THAU: What I am about to say does, in

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L.Huggins-cross

905

1 my judgment. The witness said to Mr. Kaplan on direct
2 examination that the caller had a heavy southern
3 accent.
4

5 MR. KAPLAN: A heavy voice with a southern
6 accent.

7 MT. THAU: She told me on cross-examination
8 that she would remember that voice to the day she dies,
9 substantially. It now turns out that on January 18 or
10 so she hears a voice which has an Island's accent and
11 she picks that voice as the one which she heard on
12 December 1st. Bringing that out, that misidentification
13 of January 18, I think impeaches her credibility with
14 respect to how well she heard the voice to begin with
15 and how long she will remember it from now on.

16 MR. HOCHHEISER: As the record stands
17 she has identified Burnell and it's not correct.

18 THE COURT: That is something that can
19 very, very simply be handled by stipulation among
20 counsel after she leaves the stand. But I am not
21 going into an area where the inevitable result is going
22 to be that Mr. Thau is going to elicit information that
23 doesn't help your client and vice versa.

24 MR. HOCHHEISER: I agree with you. She may
25 not be as appropriate as the government to agree.

jqrl2

L.Huggins-cross

906

1 MR. THAU: The thing is to ask the
2
3 government whether he will stipulate.

4 MR. KAPLAN: The only alternative is
5 playing the tape and ask her to make the identification.

6 MR. THAU: Would you stipulate?

7 MR. HOCHHEISER: I don't think it's fair
8 to allow her to make an identification from the tape.

9 MR. KAPLAN: Why not, two out of three.

10 I will so stipulate, your Honor.

11 THE COURT: Let's put the stipulation on the
12 record now and we will have the stenographer read it
13 afterwards.

14 MR. KAPLAN: It is hereby stipulated and
15 agreed by and between the parties that when Mrs. Lucille
16 Huggins first heard Government Exhibits 1 and 2 in
17 evidence she identified the voice of the caller that she
18 heard on December 1st as being the voice on the
19 second conversation on each of Government's Exhibits 1 and
20 2.

21 At a later time Government Exhibits 1 and 2
22 were played for Mrs. Lucille Huggins and she identified the
23 voice of the caller who she heard on December 1, 1976
24 as being the voice contained in the first and fourth
25 conversations on Government Exhibit 2.

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L.Huggins-cross

907

1
2 Thus, in effect or thus, in substance in
3 South Carolina Mrs. Huggins identified the voice which the
4 government contends to be that of Tico Moore as being
5 the voice which she heard on December 1st while later
6 in New York she identified the voice which the government
7 contends is that of Harold Burnell as being the voice
8 which she heard in South Carolina on December 1st.

9 MR. THAU: That is satisfactory.

10 (In open court)

11 THE COURT: Mr. Thau, do you have much
12 more or would this be an appropriate time to stop?

13 MR. THAU: I have no further questions of
14 Mrs. Huggins.

15 THE COURT: Mr. Hochheiser?

16 MR. HOCHHEISER: I have no questions.

17 MR. KAPLAN: I have nothing further,
18 your Honor.

19 THE COURT: Thank you, Mrs. Huggins.

20 (Witness excused)

21 THE COURT: Ladies and gentlemen of the
22 jury, the discussion which we just had at the side bar was
23 with respect to whether or not there should be further
24 examination of Mrs. Huggins with respect to certain
25 matters. It was decided between counsel that there

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L.Huggins-cross

908

1 should not be and counsel entered into a stipulation
2 with respect to those matters which will be read to you
3 and I think when it is read to you you will understand
4 why counsel so agreed.
5

6 MR. THAU: Will you instruct the jury on
7 the meaning of stipulation?

8 THE COURT: I will afterwards.

9 (Stipulation read)

10 THE COURT: Mr. Thau has suggested that I
11 explain to you the meaning of stipulation. Stipulation
12 means that, in this case, the attorneys for the
13 government and the attorneys for the defendants have agreed
14 that the statement that has just been read to you can
15 be deemed by you for all purposes evidence just as if it
16 had come from the witness.

17 In this particular case, and if counsel has
18 any objections to what I am about to say please
19 save time, we will discuss them at the break and make
20 any corrections that have to be made otherwise, but
21 in this particular case it is my belief that counsel
22 felt that they did not want to conduct an examination
23 which would cause greater sorrow to a woman who has been
24 bereaved.

25 But she has made two different identifications

1 jqr15

2 which contradict one another and which really rules
3 either of them out and so the substance of this
4 stipulation is that while she testified that she would
5 remember this voice the rest of her life she in fact
6 does not remember it because she has made conflicting
7 identifications.

8 So the substance and the effect of the
9 stipulation, it seems to me, and I will check this with
10 counsel, is that there is absolutely no identification
11 of the invoice that has been made by Mr. Huggins.

12 We will take a break for lunch at this
13 time and return at 2:15.

14 (The jury left the courtroom)

15 THE COURT: Does either the government or
16 defense counsel have any objection to my comment on the
17 stipulation?

18 MR. KAPLAN: Your Honor, prior to hearing
19 any tapes Mrs. Huggins stated that it was a heavy voiced
20 southern man and on direct examination she stated it
21 was a heavy voiced southern man and in my office she
22 said it was a heavy voiced southern man.

23 THE COURT: I don't think either the
24 stipulation or what I said affected that in any way.

25 MR. KAPLAN: If that is clear I have no

1 jqr16
2 problem.

3 THE COURT: I was talking about an identifi
4 cation and that was offered by the government and it was
5 subject to cross-examination. I don't recall that
6 there was any cross-examination about it.

7 MR. HOCHHEISER: I felt the statement was
8 very fine, your Honor.

9 MR. THAU: I have no objection to
10 your Honor's statement.

11 THE COURT: Fine. 2:15, gentlemen.

12 (Luncheon recess)
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A F T E R N O O N S E S S I O N

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(Jury in box.)

THE COURT: Mr. Kaplan?

MR. KAPLAN: Government calls Ira

I R A H U G G I N S, called as a witness

of the government, being first du

testified as follows:

DIRECT EXAMINATION

BY MR. KAPLAN:

Q Mr. Huggins, keep your voice up s
you in the back here.

How old are you?

A 16.

Q You are going to have to keep you
You will have to try. You are 16 years old?

A Right.

Q And you were born in Charleston,

A Right.

Q And where do you live now?

A Charleston, South Carolina.

Q And you live with your parents?

A Yes.

Q And do you go to school?

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I.Huggins-direct

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A Yes.

Q What school do you go to?

A St. Andrews High.

Q Is that Charleston?

A Yes.

Q What grade are you in?

A 9th.

Q And do you have any brothers and sisters?

A Six brothers, two sisters.

Q And what is your oldest brother's name?

A Buster.

Q Let me show you Government's Exhibit 40, already
in evidence, and ask you if you recognize the man shown
in that photograph.

A That's my brother.

Q That is your brother Buster?

A Yes.

THE COURT: Mr. Huggins, there are 15 people
sitting in that jurybox, and every one of them has to hear
you, including the people at the very end, so please speak
up.

THE WITNESS: All right.

Q Now, Mr. Huggins, let me direct your attention
to Wednesday night, December 1st. Do you recollect

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I.Huggins-direct

receiving a telephone call on that evening?

A Yes.

Q Where were you?

A In the kitchen.

Q In your house down in South Carolina?

A Right.

Q Did you pick up the phone?

A Right.

Q Tell us everything that happened in that call from the time that you picked up the phone.

A Before he speak, the operator said, "35 cents more." Then he came on and asked to speak to Buster Huggins, Sr. I told him he wasn't here. Then he asked me to speak to my mother. I put her on the phone. And I listened in.

Q Where was your mother?

A In bed.

Q Did she have a phone in the bedroom?

A Yes.

Q She picked up on the phone in the bedroom?

A Yes.

Q You kept listening on the phone in the kitchen?

A Yes.

Q What did you hear?

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I.Huggins-direct

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2 A I hear the man came on and he said, "Mrs.
3 Huggins, we got your son." And he put my brother on,
4 and he speak again. He told her he wants a quarter
5 of a million dollars.

6 Q Your brother said that?

7 A No.

8 Q The man said that?

9 A Yes. He said he wanted a quarter of a million
10 dollars at my brother's garage at 4 o'clock on Friday.

11 Q Did he tell you who was supposed to bring the
12 money?

13 A My daddy, Buster, and Martha.

14 Q Your daddy, Buster, Sr.?

15 A Yes.

16 Q Now, when in the call was your brother put on:
17 the beginning, the end or the middle?

18 A Oh, he spoke and then my brother spoke and he
19 spoke.

20 Q What did your brother say?

21 A "Mama, do what these people say."

22 Q Do you remember anything else about the call?

23 A The guy had a heavy voice.

24 Q The caller had a heavy voice?

25 A Right.

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I.Huggins-direct

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2 Q What I am going to do now is play for you the
3 first conversation that appears on Government's Exhibit 3
4 in evidence, and after it is played I am going to ask you
5 if you recognize the voice on that call.

6 Do you understand me?

7 A Yes.

8 MR. THAU: Your Honor, may we approach the
9 bench?

10 THE COURT: Yes.

11 (At the side bar.)

12 MR. THAU: Your Honor, to do what Mr. Kaplan
13 now proposes to do is unduly suggestive with this witness,
14 about whom I can say in confidence that he doesn't know
15 my client, and I would further say that based on the 3500
16 material given us on this witness by Mr. Kaplan, it would
17 appear that he, the witness, was played only one call in
18 Mr. Kaplan's --

19 MR. KAPLAN: No. That is not true.

20 MR. THAU: He was played more than one call?

21 MR. KAPLAN: He was played the entire tape.

22 MR. THAU: It says here that he was played
23 G.J.2, which I take it to mean Grand Jury Exhibit 2,
24 the first call.

25 Now, I think this witness knows that on the

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I.Huggins-direct

specific call to be played for him now he is expected to identify him as the specific caller who called on December 1st, and there is so much room for error in that sort of identification, the sort of tragic experience with the mother, things that she would remember forever and always identify -- this kid almost has to say, "Sure, this is the man who called on December 1st."

It is too risky an enterprise to chance it. It is not sufficiently probative.

THE COURT: Mr. Kaplan?

MR. KAPLAN: First of all, if the objection is in the nature of a Wade hearing, the Second Circuit has held that identification can be made from a subsequent call. The tape that is going to be played is not the same one that was played for him initially.

Under all the circumstances, the weight of his testimony and his credibility will be subjected to full attack by defense counsel, but it is permissible under the law in this circuit for us to play this conversation.

MR. THAU: Your Honor, I didn't ask for a Wade hearing. I did make an objection that went to the weight area.

I think it is unduly suggestive, under the circumstances.

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I.Huggins-direct

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1 THE COURT: Mr. Kaplan is suggesting that your
2 cross-examination can raise questions which will go to the
3 weight.
4

5 MR. THAU: Yes, but I don't think I can
6 surmount the prejudice, even if I were as good a cross-
7 examiner as Mr. Hochheiser.

8 THE COURT: I see no problem with this, Mr.
9 Thau.

10 MR. HOCHHEISER: For the record, I join in
11 the objection.

12 (In open court.)

13 MR. KAPLAN: This is Exhibit 2, the first
14 call.

15 (Tape was played.)

16 Q (Continuing) Do you recognize the voice of the
17 man on that call?

18 A Yes.

19 Q What voice is that?

20 A The man who called down South.

21 Q Are you sure of that?

22 A Yes.

23 Q By the way, did you ever meet a guy by the name
24 of Marion or Harold Burnell?

25 A (Witness shakes head.)

1 mpp8 I.Huggins-direct

2 Q No.

3 A (Witness shakes head.)

4 MR. KAPLAN: No further questions.

5 MR. THAU: The record will indicate that the
6 witness shook his head in the negative and didn't answer
7 it.

8 THE COURT: I will ask the stenographer to
9 read the question again, and I will ask the witness to
10 answer the question.

11 (The following question was repeated by
12 the reporter.)

13 "Q By the way, did you ever meet a guy by the
14 name of Marion or Harold Burnell?"

15 THE WITNESS: No.

16 MR. KAPLAN: That is all.

17 CROSS EXAMINATION

18 BY MR. THAU:

19 Q Mr. Huggins, you said that the man who called
20 down South on December 1st had a heavy voice. Is that
21 the way you described it?

22 A Yes.

23 Q And can you give us any other description of
24 that voice?

25 A Yes. He had a Southern accent.

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I.Huggins-direct

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Q Anything else that was noticeable?

A A deep and heavy voice. That's all I can say.

Q Now, Mr. Huggins, in the last two months you have had occasion to discuss this case with others, haven't you?

A Yes.

Q With whom?

A Like who?

Q Like your mother and your brothers and Rickie, Glenn --

A I live in the South. They live in New York.

Q Your mother lives in the South; is that right?

A Right.

Q And you came up to New York when?

A Monday.

Q Did you keep in telephone contact with Glenn up here in New York?

A I saw him every day.

Q Down South or here?

A Here.

Q Since you came up?

A Right.

Q Before coming up here to appear in this trial,

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I.Huggins-direct

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were you in telephone contact with Glenn and Rickie, your two brothers who live here in New York?

A No.

Q Did they come down South since December 1st?

A No.

Q You have had no phone calls with them?

A No.

Q Now, you came up here Monday. Do I take that to be two days ago?

A (Witness shakes head.)

Q You are shaking your head. Would you please answer?

A No. Monday last week.

Q And since then --

MR. THAU: Withdrawn.

Q You were interviewed by Mr. Kaplan on February the 11th, weren't you?

A Yes.

Q And where was that interview conducted?

A Mr. Kaplan's office.

Q Does that mean that you came up to New York before Monday of last week?

A I had been up here, and then I went back home.

Q How many times have you been up here in New

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I.Huggins-direct

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2 York since December 1st?

3 A Two.

4 Q So this is your third trip up?

5 A (Witness shakes head.)

6 Q This is your second trip up, Mr. Huggins?

7 Please speak out your answers, because this gentleman can't
8 take down a shake of the head.

9 Now, on the first visit you made to New York,
10 how many days did you stay?

11 A Four.

12 Q Where did you spend the nights?

13 A At my brother Michael's house.

14 Q And did you see Rickie and Glenn?

15 A I saw Glenn every day. I saw Rickie one day.

16 Q That is on the first trip; right?

17 A Right.

18 Q Now, did you ever hear anybody else use that
19 phrase, "heavy voice," in connection with this case?

20 A Around me?

21 Q Yes.

22 A No.

23 Q No one else? You are sure of that?

24 A Yes.

25 Q How would you describe Mr. Kaplan's voice?

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I.Huggins-direct

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A He talks like a regular man to me.

Q Isn't there any other way of describing it?

A No.

Q How about mine?

A You don't have a heavy-set voice. You talk like a regular man.

Q Did you on your first trip up to New York discuss with Rickie certain tapes that Rickie had listened to some time in December?

A No.

Q You came up here to New York, and your brother had disappeared; right?

MR. KAPLAN: Objection.

MR. THAU: Withdrawn.

Q You came up here to New York in connection with this case; isn't that right?

A Right.

Q And this case, you knew, was involved with the disappearance of your brother Buster; right?

A Right.

Q And you were very concerned about Buster, weren't you?

A Right.

Q And so was Rickie; right?

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A Right.

Q Rickie is another brother of Buster's; is that correct?

A Right.

Q And Glenn was very concerned, wasn't he?

A Right.

Q And you had personally spoken to a person who was probably involved in Buster's disappearance; right?

A Right.

Q And you told Rickie and Glenn that you had spoken to a person who was probably involved in Buster's disappearance; right?

A That I told them that?

Q Yes.

A He asked me that.

Q And you told him the truth; right?

A Right.

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I.Huggins-cross

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2 Q And at that point when you had those conversa
3 tions with your two New York beothers they told you, didn't
4 they, that they had already heard certain tapes, is that
5 right?

6 A No.

7 Q They never told you that?

8 A No.

9 Q Did they tell you specifically that they
10 had not heard tapes?

11 A They didn't tell me anything about any
12 tapes.

13 Q Did they ask you what does this guy sound
14 like, we live in New York, maybe we can recognize who
15 it is?

16 A Not Ricky or Glen.

17 Q Not Ricky or Glen, did you say?

18 A Right.

19 Q Did you have similar sort of conversations or
20 conversation with Martha?

21 A If I talked to her?

22 Q Did you talk to her on the first trip you
23 came up for in New York?

24 A Yes.

25 Q Did Martha tell you "I spoke to one or more

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I.Huggins-cross

men on the telephone and I heard tapes"? Did you anything like that?

A No.

Q Did Martha tell you, "I think one of the guys has a heavy voice"?

A No.

Q Is it your testimony, Mr. Huggins, no one, either family or acquaintance, told you had spoken to one of the men and that they had listened to a tape or more than one tape?

A Are you asking me?

Q Yes.

A If they tell me which voice to identify

Q No. I am asking you whether either the brothers or Martha or anyone else told you that she had spoken to one of the men who was called

A Martha.

Q Did she also tell you that she had listened to those certain tapes and that she had listened to those

A No.

Q Did Martha tell you anything about whether she had spoken to one man or two men or three men or a number?

A She was talking to my brother and

1 jqr3 I.Huggins-cross

2 the conversation.

3 Q This was over the telephone or in person?

4 A No, this was at Martha's house.

5 Q Did you hear or overhear Martha say that
6 she had spoken to one man on the phone or more than one?

7 A She spoke to a man on the phone.

8 Q One man?

9 A She didn't say how many.

10 Q When she was speaking of the incoming
11 threatening and demanding calls did she say to your
12 mother there was oneman calling me or there is a man
13 calling me or there are men calling me?

14 A She didn't say.

15 Q On your first visit to New York you spoke
16 to FBI agents?

17 A No.

18 Q You spoke to Mr. Kaplan?

19 A Right.

20 Q And Mr. Farkash, the gentlemen to Mr. Kaplan's
21 left was in the office at the time?

22 A Yes.

23 Q And at that time you were asked to listen
24 to some tapes?

25 A Yes.

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I.Huggins-cross

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Q Had any FBI agents interviewed you before that in South Carolina?

A No.

Q Or in New York?

A No.

Q So that your visit of February 11 at Mr. Kaplan's office was your very first contact with a law enforcement person, right?

A Right.

Q Mr. Huggins, when you first picked up the phone in your kitchen on December 1st what did the person on the other side first say to you?

A I can't tell you exactly what he said.

Q Approximately.

A First the operator said something and then he said something.

Q What did he say?

A He said "Listen" and then he spoke -- he kept on speaking and then he put my brother on and then he took the phone away from him and then he spoke.

Q I am sorry, I didn't follow you.

A He spoke and then my brother spoke.

Q To you or was that after your mother got on?

A After my mother got on.

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Q Let's take it in order.

3

4

Before Mrs. Huggins takes the phone, you pick up the phone when it rings, right?

5

A Right.

6

Q You hear an operator?

7

A No, he came on the phone and he said --

8

9

Q What did the man say to you before you put your mother on?

10

A "Hello, may I speak to Buster Huggins,

11

Jr." and I told him he wasn't home and then he said

12

"Let me speak to your mother."

13

Q Buster Huggins, Jr. is the Buster who lived

14

in New York and who owned the transmission ship?

15

A Right.

16

Q So the man then said "Let me speak to your

17

mother"?

18

A Right.

19

Q And is that the point where you called your

20

mother saying "There is a phone call for you"?

21

A Right.

22

Q And have you told us basically everything

23

that this man said to you before you put your mother on?

24

A I think so.

25

Q Think about it for a moment. Take your time.

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I.Huggins-cross

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A Just about everything.

Q By the way, did you hear an operator?

A Yes.

Q Did the operator ask for an additional 30 cents or some such?

A I think it was 35 cents.

Q Was this before you called your mother? Or was it after?

A After.

Q You understood, didn't you, that the operator was not asking for that money from your end but was asking it from the caller, right?

A Right.

Q You assumed that the caller was probably calling from a --

A Telephone booth.

Q Exactly.

Before you put your mother on this caller did not speak any threats, right?

A Yes.

Q He did?

A He said he we don't give him the money you will never see my brother again.

Q Before you put your mother on?

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I.Huggins-cross

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Q Please listen to me, Mr. Huggins.

Do you remember my asking you to think as much as you needed about what this caller told you before you called your mother to her phone? Have you thought about it?

A Yes.

Q And have you told me fully what he told you before you called your mother?

A Before I called my mother?

Q Yes.

A Yes.

Q And basically he said, didn't he, "I want to speak to Buster Huggins, Jr." and you said, "He is not here"?

A Right.

Q And then he said "Let me speak to his mother" or something like that?

A Right.

Q That is the total of what this man told you before you put your mother on, right?

A Right.

Q He didn't say "I got your brother" or words to that effect, right?

A To me?

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I.Huggins-cross

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2 Q Yes, before you put your mother on.

3 A No.

4 Q He didn't ask for any money, right?

5 A No, not to me.

6 Q Everything I am asking you now is before you
7 put your mother on. Have you got that straight?

8 A Yes.

9 Q No talk about any killings, right?

10 A No.

11 Q This was about what time of the evening?

12 A Say about 9:30.

13 Q How many people live in your household?

14 A Say about five.

15 Q Would you say that there isn't anything
16 either alarming or unusual about a 9 o'clock phone
17 call? By that I mean this: that it's unusually late
18 for the family to receive a phone call?

19 A No.

20 Q 3 o'clock in the morning would be unusual,
21 right?

22 MR. KAPLAN: Objection.

23 THE COURT: Objection sustained.

24 Q Did you sort of shout over from the kitchen
25 so that your mother might hear you in the bedroom?

1 jqr9

2 A Yes.

3 Q Is it the custom in your house when one
4 member of the household picks up one phone and the
5 call is for the other, for the one for whom the call is
6 intended to say "Okay, I got it," something like that?

7 A No.

8 Q No?

9 A No.

10 Q Let's say you put me up for a day or two
11 as your house guest and a phone call came for me and you
12 would alert me to it. You know, don't you, that when
13 I picked up the phone let's say in the bedroom I could
14 say to you from that phone "Okay, Ira, I have it, you can
15 hang up"?

16 A Right.

17 Q Did you listen in to see that your mother
18 or whoever was in the bedroom had picked up the phone?

19 A Yes.

20 Q Did you hang up?

21 A No.

22 Q There was nothing unusual about what you
23 had heard up to the point your mother picked up the
24 phone, is that right?

25 A Yes.

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I.Huggins-cross

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Q There was something unusual?

A No.

Q You have picked up the phone before where the caller wanted to speak to either your mother or any other member of your household, haven't you?

A Yes.

Q And is it your usual practice, Mr. Huggins, to listen in on calls like this?

A Yes.

Q It is?

A Yes.

Q Did you participate in the conversation between your mother and the caller?

A Did I say anything?

Q Yes.

A No.

Q By the way, do you still listen in on conversations?

A Yes.

Q Did you and your mother at the end of this phone call discuss this very frightening phone call that you two had received?

A Did we discuss it?

Q Yes.

jqrll

I.Huggins-cross

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A Yes.

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Q You were aware at this point, weren't you,

4

that most likely the police was going to get called on

5

this and that an investigation would get started, right?

6

MR. KAPLAN: Objection.

7

THE COURT: Overruled.

8

Q Do you remember the question?

9

THE COURT: Were you aware that there would

10

be a police investigation?

11

THE WITNESS: No. I thought my father

12

was going to pay the money.

13

Q Did you have any reason to believe that your

14

father had a quarter of a million dollars to pay for

15

someone?

16

A No.

17

Q How was he going to pay the money?

18

A He can get it if he wants it.

19

Q A quarter of a million?

20

A I wouldn't say that much money.

21

Q You are 16 years of age?

22

A Yes.

23

Q What does your father do for a living?

24

A He works at the navy yard.

25

Q And your mother is a maid in a hospital, I

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I.Huggins-cross

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believe?

A Right.

Q When is the last time you had seen Buster before December, that is your brother Buster?

A I would say about September '76.

Q Do you know whether Buster was giving or leaving with your father or any other member of the household large amounts of money?

A No.

Q You don't know?

A No.

Q Was he leaving any money at all, and if so, about how much?

A I don't know.

Q Mr. Huggins, you know that a quarter of a million dollars is a lot of money, right?

A Yes.

Q A lot more than a working man and his working wife generally have, right?

A Yes.

Q What reason did you have for believing that your father might be able to get a quarter of a million dollars?

A He got friends.

1 Q Mr. Huggins, on February 11 when you first
2
3 spoke to Mr. Kaplan is this a trip that your mother took
4 up to New York also?

5 A Yes.

6 Q And were you present when tapes were played
7 for your mother?

8 A No.

9 Q Did your mother tell you that tapes had been
10 played for her?

11 A Did she tell me?

12 Q Yes.

13 A Yes.

14 Q Did your mother tell you that she had identified
15 a certain voice on a tape as the voice of the man who had
16 called on December 1st?

17 A Did she tell me that after she came out of
18 Mr. Kaplan's office?

19 Q Yes.

20 A No.

21 Q Did she tell you that down south?

22 A No.

23 Q Are you familiar with an accent that may be
24 called a West Indies accent, is that phrase familiar to
25 you?

jqrl4

I.Huggins-cross

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A Is it familiar to me?

Q Yes.

A Yes.

Q Have you known people who speak with that
kind of an accent?

A No.

Q Have you known any persons who had what
you called a heavy voice?

A Do I know any person who has a heavy voice?

Q In your whole life have you known any person
whose voice you can describe as a heavy voice?

A Yes.

Q Who?

A My brother.

Q Which brother?

A My oldest one.

Q Buster?

A Yes.

Q Anybody else?

A No.

Q On December 11 you knew that two men had been
arrested --

MR. KAPLAN: February 11?

Q On February 11 when you came up to New York

jqrl5

I.Huggins-cross

9

the first time you knew that two men had been arrested
didn't you?

A Yes.

Q And you were told the names of those men?

A Yes.

Q And you were told that one of them was Har
Burnell, right?

A Harold?

Q Marion.

A Marion.

Q Marion Burnell?

A Just Marion.

Q Who told you it was Marion?

A Michael.

Q Michael is a brother of yours?

A Yes.

Q And he is the fellow who lives in New York
and at whose house you stayed at on that trip?

A Yes.

Q So he told you that Marion has been arrested
right?

A Yes.

Q Did anyone tell you this Marion's second
name?

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A No.

3

Q At this point, up to this point d

4

tell you Marion's second name?

5

A Up to this point?

6

Q Yes.

7

A No.

8

Q No one at all?

9

A No.

10

Q Did anyone tell you whether Mario

11

or different first name?

12

A Did anybody tell me that?

13

Q Yes.

14

A No.

15

Q When Michael told you that Marion

16

been arrested did that name mean anything to

17

A No.

18

Q Had you ever met a Marion in your

19

A No.

20

THE COURT: No further questions,

21

MR. THAU: Yes, I do, your Honor

22

Q I ask you to look at Harold Burne

23

gentleman right here -- will you stand up, Mr

24

Have you ever seen this man before

25

A Yes.

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I.Huggins-cross

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Q Where?

A Where?

Q Yes, and when.

A I couldn't tell you when and I couldn't tell
you --

Q Approximately.

A I htink about '75.

Q And where was that?

A In my brother's garage.

Q Did you speak to him?

A No.

Q Did either Michael or Mr. Kaplan or an FBI
agent ever shor you a photo of Mr. Burnell, the gentleman
youjust saw?

A No.

Q Did anyone tell you that some persons were
saying that Harold Burnell or Marion Harold Burnell
was a man with a heavy voice?

A No.

Q Didn't you in fact tell Mr. Kaplan, in Mr.
Farkash's presence, that you had met a Marion some two
years ago and thatthat Marion had a heavy voice? Isn't
that what you told Mr. Kaplan?

A No, I didn't tell him I met him. I told him

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I.Huggins-cross

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I had seen him.

Q Did you tell him that you had heard him
speak?

A No.

Q I show you --

MR. KAPLAN: Objection. Might we approach
the side bar?

THE COURT: Yes.

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I.Huggins-cross

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(At the side bar.)

MR. KAPLAN: When I wrote this down, I understood the witness to say what appears on this.

THE COURT: By "this," you are referring to --

MR. KAPLAN: 3507-A.

MR. THAU: Second paragraph on page 2.

MR. KAPLAN: When I asked him about it the other night, he said my understanding was wrong, and he directed it to what he is testifying to, so apparently I made a mistake in understanding what was going on, but he emphatically denied it the other night, that what I have here is corrected.

MR. THAU: Well, I didn't get corrected 3500 material, and I am proceeding in good faith based on 3507-A.

MR. HOCHHEISER: It looks pretty specific.

MR. KAPLAN: Your Honor, as the 3500 material indicates, my notes were turned over to Mr. Thau out of abundance of caution rather than because I thought it was appropriately to be turned over.

MR. THAU: Your Honor, the fact that the government sees fit to put a self-serving introduction to these interviews does not keep it from being proper 3500 material.

THE COURT: Well, these notes do not involve

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I.Huggins-cross

an inconsistency, and do not constitute a statement --

MR. THAU: Your Honor, there is no difference between these statements and agents' 302's. The 302's are transcripts, which do not allege to be transcripts of questions and answers.

There is no difference in the manner of taking.

THE COURT: Then maybe what I am saying applies to the 302's also.

MR. HOCHHEISER: Of course, this particular statement, your Honor, is definitely a recorded statement of the witness. Even though it may not be verbatim, there isn't much left out.

THE COURT: It is not a recorded statement.

MR. HOCHHEISER: Most respectfully, I submit it is.

THE COURT: I would rule it is not for the purposes of this trial a recorded statement of the witness, so that matter can be laid to rest.

I will permit examination on this, because it does seem to me that whether or not it is verbatim, it is certainly in his own terms a definitive statement.

I will permit examination with respect to it.

MR. THAU: Thank you.

(In open court.)

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I.Huggins-cross

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1 Q Mr. Huggins, I show you Exhibit 3507-A for
2 identification, and I call your attention to the second
3 paragraph of the second page. I show it to you, and
4 I ask you to read it to yourself -- not out loud.
5 All right? Read it to yourself and tell me when you have
6 read it.
7

8 (Pause.)

9 Q (Continuing) Now, having read what I just
10 showed you, does that refresh your recollection whether
11 around February 11th you told Mr. Kaplan that about two
12 years ago you had heard a Marion whom you met at Buster's
13 shop speak?

14 A No. I told him I seen him in my brother's
15 shop. It wasn't that I heard him speak.

16 Q Does it refresh your recollection whether on
17 the same day you told Mr. Kaplan that the Marion you had
18 met at the shop had a heavy voice?

19 A I told him I seen him. I never talked to him.

20 Q Would you say therefore that what I have just
21 showed you --

22 THE COURT: Mr. Thau, whatever you showed him
23 is not in evidence.

24 MR. THAU: I withdraw that.

25 Q Mr. Huggins, on December 1st did you say that

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I.Huggins-cross

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1
2 someone took the phone away from you before the conver-
3 sation between your mother and the caller finished?

4 A That somebody took the phone away from me?

5 Q Yes. Did you say something like that?

6 A No.

7 Q Forgive me. I may have misunderstood you.

8 MR. THAU: Thank you. I have no further
9 questions.

10 THE COURT: Mr. Hochheiser?

11 MR. HOCHHEISER: No questions. Thank you,
12 Judge.

13 MR.KAPLAN: No redirect.

14 THE COURT: Thank you, Mr. Huggins.

15 (Witness excused.)

16 THE COURT: Next witness?

17 MR. KAPLAN: Government calls Stephen
18 Gilkerson.

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2 CHARGE OF THE COURT

3 THE CLERK: The Court is about to charge the
4 jury.

5 Any spectator wishing to leave the courtroom
6 will do so now, or else remain seated until the completion
7 of the Court's charge.

8 Will the marshals see that the door is locked,
9 please.

10 THE COURT: Ladies and gentlemen of the
11 jury, there is a rhythm in any jury trial and I think you
12 have pretty well had an opportunity to observe this
13 rhythm.

14 For the first, very first part of the trial,
15 the focus is on the jury. You have the choice of the
16 jurors, the voir dire of the jurors, the openings of the
17 lawyers to the jury and the preliminary instructions of
18 the Court to the jury.

19 Then the focus turns away from the jury
20 and you become mere spectators. You are not participants
21 in any way. You listen to the evidence, you watch
22 the development of the case and the actors are out
23 here.

24 Now we are reaching the stage where the
25 focus is moving back, it is swinging back to the jury.

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2 The government's case was completed, the
3 defendants' case was completed, rebuttal was completed,
4 summations were directed towards the jury.

5 This charge is being directed towards the
6 jury.

7 When I finish this charge, this case will be
8 in your hands. And that really is what this charge is
9 all about.

10 Now, counsel this afternoon gave you their
11 views and their contentions on the evidence.

12 I told you before, and I repeat it now
13 because it is a very important thing constantly to
14 repeat, that each one of the lawyers who spoke to you
15 is an advocate representing a client. An advocate
16 presents his case as vigorously as he can. And a great
17 deal of the advocacy before this jury was extemporaneous.
18 While the lawyers had notes, they were speaking to you,
19 in great part, not from the notes but directly, and so
20 there were some misstatements of the evidence. The
21 lawyers were stating their honest recollection, but their
22 recollection, in some cases, was not correct.

23 Now, I had given attorneys for both government
24 and defendants instructions that I did not want summations
25 interrupted by objections, and very courteously the

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attorneys for both the government and the defendants did not interrupt, although they had objections which they silently made and which we discussed afterwards.

The purpose of this very preliminary statement is to correct what was involved in those objections, which, in principal case, was a misstatement or a misrecollection of what the evidence was.

I am not going to cite out particular chapter and verse, but I am telling you that it is very important that you realize and you accept this fact that you become the judges of the facts in this case.

The summations by the attorneys this afternoon I think were very useful to you in our ultimate role as judges of the facts because the facts were reviewed in fairly great detail by both the government and defense counsel in making their contentions to you.

But you are the judges of the facts and anything they said with respect to the facts not only is not binding on you, but it is very important that you draw on your own recollection of what the facts are, what the evidence was, what the testimony was, what the exhibits were, what the stipulations were, draw on your own recollections rather than at any point trying to remember what one of the attorneys said the

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2 evidence was.

3 Now, my final function is to instruct you on
4 the law. Now, you don't have to at this stage or here-
5 after, you don't have to try to remember any instructions
6 I have given you in the past. This is my comprehensive
7 instruction on what the law is with respect to this case
8 and with respect to the evidence before you.

9 Don't worry about anything I may have said
10 in the past about evidence being introduced for certain
11 purposes and not other purposes. Just try to listen
12 to and remember what I say now.

13 It is your duty, incidentally, as jurors to
14 accept what I say now. This is the law, and you have
15 no function with respect to the law. Your function is
16 with respect to the facts. This is the law that you
17 should use in interpreting the facts and arriving at a
18 final conclusion.

19 Don't try to substitute for my statement
20 of the law with what you think the law ought to be.
21 And you should consider this charge I am giving in
22 its entirety. Don't just take one piece of it and
23 focus on that. Try to take in the whole charge, and
24 remember that the whole charge applies to your function
25 which you will be performing after I finish, of studying

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2 the facts and of arriving at a final conclusion.

3 You are the sole and exclusive judges of
4 the facts. You determine the weight of evidence; you
5 apprise the credibility of witnesses; you draw such
6 reasonable inferences from the facts as you think should
7 be drawn--that you think the evidence warrants; you
8 resolve conflicts that you may find in the evidence.

9 I will later talk to you about certain things
10 that you can do that will assist you in resolving these
11 conflicts in determining what the evidence is and in
12 determining any questions of credibility or believability.

13 I will emphasize again, anything any
14 attorney said during the course of this trial with respect
15 to any testimony, in his summations where he reviewed
16 the testimony, during the trial in asking a question and
17 making an objection or an argument, none of that is to
18 be substituted for your recollection of the evidence.

19 And anything I said during the trial, anything
20 I may say during the course of this charge with regard to
21 evidence or testimony should not be taken by you instead
22 of your own recollection. Your own recollection
23 controls.

24 I may refer to some evidence during the course
25 of this charge and I will attempt to do it accurately,

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2 but I may make a mistake, just as the attorneys today
3 made some mistakes. It is your recollection and yours
4 alone that governs.

5 Don't take anything I say as binding as to what
6 the testimony is, ~~take it as~~ binding only as to what the law
7 is.

8 During the course of the trial occasionally
9 I asked a witness a question. When I did that, my
10 purpose was to attempt to clarify testimony that I
11 thought was not clear or to rephrase a question which I
12 thought should be more pointed or more precise.

13 Please don't assume that I hold any opinion
14 as to the facts in this case or as to any matters that my
15 questions may have related to. Don't speculate concerning
16 my opinion. It is not my function in this jury trial
17 to have any opinion as to the facts; you are the judges
18 of the facts.

19 In this connection, please bear in mind that
20 a question is not evidence. There were many questions
21 put during the course of this trial to which objections
22 were made and those objections were sustained, there
23 were other questions that were put where the answer was
24 inconclusive. I don't know. Those questions are not
25 evidence. It is only a question which is then answered

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2 where the question is important to the meaning of the
3 answer that has any meaning as evidence.

4 Now, during this trial attorneys for both
5 government and defendants made objections, made various
6 motions, took other procedural positions. Those are
7 proper concerns of the attorneys and myself, they
8 don't concern you at all.

9 You are not to draw any inference one way
10 or the other from any of those matters or from how I may
11 have ruled on any of those matters.

12 I think I should explain something here which
13 is sometimes baffling to jurors.

14 There are rules of evidence. Those are
15 rules that the judge knows and rules that the lawyers
16 know. And the purpose of those rules of evidence, the
17 intent of those rules of evidence is to make sure that
18 to the extent possible, reliable evidence reaches the
19 jury. It is a process of sifting out.

20 There are various rules that have been
21 developed through the ages which determine the admissi-
22 bility or the non-admissibility of evidence. These are
23 professional concerns of lawyers and of the judge, who
24 ultimately makes the ruling on that, and they are not
25 concerns of yours.

1 gtr8

2 What you are concerned with is wh
3 through that process, got before you and is b
4 right now.

5 Now, you have noted that during t
6 of the trial, and I imagine you have been qui
7 at it at times, we had side bar conferences.

8 Again, the purpose was to discuss
9 of law and to give the attorneys and myself a
10 freedom in talking about the questions and ar
11 about the questions of law without having to
12 our discussion for fear that anything we migh
13 would influence the jury in a way it shouldn'
14 the jury.

15 Again, we were dealing with quest
16 law and not questions of fact.

17 Counsel have the right and the du
18 such conferences and to participate in the co
19 and, as a matter of fact, in this trial I spe
20 directed the attorneys that I wanted no argum
21 objections or any motions before the jury, aga
22 I wanted to be sure that this jury has before
23 facts that should properly come before it in t
24 of the adversary proceeding.

25 I said I may refer to some evidenc

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2 along in this charge.

3 All of the evidence in the case is important
4 and you are to consider it all in the deliberations which
5 you will have whether I discuss it or not.

6 During the summations you heard this afternoon,
7 the attorneys for the government and the defendants made
8 arguments, set forth contentions on behalf of their
9 clients. They waxed quite eloquent at times and there
10 was quite a bit of rhetoric at times.

11 You should consider all the arguments that
12 the attorneys made whether or not I specifically refer
13 to the arguments they made or to the contentions they
14 made in my charge.

15 If an argument commends itself to you,
16 consider it. Accept it if you deem it proper on the
17 evidence to accept it. If not, you may reject it.

18 Those arguments, again, are not evidence, but
19 they are merely suggestions which you may accept or
20 reject as to how you should view the evidence.

21 This case is to be decided under the law
22 as I shall outline it upon the evidence, or the lack of
23 evidence, and the reasonable inferences to be drawn from
24 the evidence or lack of evidence. It is not to be
25 decided upon the rhetoric of any attorney representing

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2 any party.

3 Now, if you wish during the course of your
4 deliberations to consider any exhibit in the case, you may
5 ask for it and it will be made available. If you wish
6 to hear some testimony or any stipulation that was made
7 among counsel during the course of trial, it will be
8 read to you. And you may take a copy of the indictment
9 with you into the jury room.

10 Now, this is an important case. Obviously
11 it is important to the parties, it is important to the
12 public. It is important to the government and the public
13 because the enforcement of criminal laws is a matter
14 of continuing concern to our community. It is important
15 to the defendants because each of them is charged with
16 a serious crime.

17 The fact that the government is a party
18 entitles it to no greater consideration than that that is
19 given to any other party in any other lawsuit. By
20 the same token, the government is entitled to no
21 less consideration. The government and the defendants
22 in this courtroom, in this trial before you, stand as
23 equals.

24 The charges against the defendants are set
25 forth in an indictment.

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2 Now, what is an indictment?

3 An indictment is a document. It is a document
4 which serves as a vehicle, serves as a method, really,
5 to notify the defendants of the charges against them
6 and to set forth the grand jury's charges before you.
7 It serves to limit the charges against the defendants.
8 The defendants are charged with what is in the indictment;
9 they are not charged with anything else. They are only
10 on trial for what is in that indictment.

11 The indictment is not evidence. It does
12 not prove anything. No weight whatsoever is to be given
13 by you in the course of your deliberations to the fact that
14 an indictment has been returned.

15 When the defendants first came before this
16 court after the grand jury issued that indictment, they,
17 the defendants, pleaded not guilty. They plead not
18 guilty before you. They are, moreover, presumed to be
19 not guilty, they are presumed to be innocent.

20 By pleading not guilty to every charge of the
21 indictment, both defendants have, as a matter of law,
22 denied each and every material allegation in the
23 indictment.

24 A defendant does not have to prove anything;
25 he is presumed to be innocent of the charges contained in

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1 gtr12

2 the indictment. He does not have to prove innocence.
3 Thus, a defendant is not required to testify or to intro-
4 duce any evidence in his own behalf. He may elect not
5 to testify, he may elect not to offer any evidence, and
6 his election not to testify must not be considered by
7 you in your deliberations. You must not draw any adverse
8 inferences from it nor speculate as to the reason.

9 I said that there is a presumption that the
10 defendants are innocent. Against this presumption the
11 government at all times, throughout the course of this
12 trial, has had, still has and will have all the way to
13 the end the burden of proving the charges against the
14 defendant beyond a reasonable doubt.

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2 Now, this presumption of innocence is not an
3 idle phrase, and it is not to be taken lightly by the
4 jury. It is an important right that belongs to every
5 defendant accused of crime.

6 You are bound to accept the presumption
7 conscientiously without any mental reservation, and to
8 give the defendants the full benefit of the pre-
9 sumption.

10 The presumption was in their favor at the
11 start of the trial; it has continued in their favor
12 throughout the trial; it is in their favor even as I
13 am instructing you right now. It will remain in their
14 favor throughout the course of their deliberations in
15 the juryroom.

16 This presumption of innocence will be
17 removed only if and only when you are satisfied that
18 the government has sustained its burden of proving the
19 guilt of a defendant beyond a reasonable doubt. At
20 that point, if it is ever reached, the presumption of
21 innocence will fall away.

22 Thus, your function is to pass upon a
23 defendant's alleged guilt, not his innocence. He is
24 presumed innocent. The presumption of innocence
25 prevails unless the government's evidence rises to the

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1 mpp2 14

2 level of proof of guilt beyond a reasonable doubt.

3 Accordingly, you are not ask yourselves
4 whether a defendant is innocent, and you should not
5 deliberate on whether the evidence shows innocence.
6 You are to deliberate only on whether the evidence
7 demonstrates guilt, and the standard of proof is guilt
8 beyond a reasonable doubt.

9 Now, I have used these words, "reasonable
10 doubt," fairly often already, and you will notice that
11 the attorneys in their summations referred to them.

12 What is a reasonable doubt? Well, the words
13 practically define themselves, both in terms of what it is
14 and what it isn't.

15 Reasonable doubt is a doubt founded on
16 reason, a doubt arising out of the evidence or the lack
17 of evidence, as the case may be. It is a doubt which a
18 reasonable person has after carefully weighing all the
19 evidence.

20 Reasonable doubt is a doubt that appeals to
21 your reason, to your judgment, to your commonsense, to
22 your experience.

23 Reasonable doubt is not caprice, whim,
24 speculation, guesswork, conjecture, speculation.
25 Reasonable doubt is not an excuse to avoid the per-

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1 mpp3 15

2 formance of an unpleasant duty. Reasonable doubt
3 is not sympathy for a defendant.

4 If after a fair and impartial consideration
5 you can candidly and honestly say on the basis of all
6 of the evidence that you are not satisfied of the guilt
7 of a defendant, that you do not have an abiding con-
8 viction of his guilt -- in sum, if you have such a doubt
9 as would cause you as a prudent person to hesitate
10 before acting in matters of importance to yourself,
11 then you have a reasonable doubt. If you have such a
12 reasonable doubt, you must acquit.

13 If, on the other hand, after a fair and
14 impartial consideration you can candidly and honestly
15 say on the basis of all the evidence before you that
16 you do have an abiding conviction of a defendant's
17 guilt, such a conviction as you would be willing to act
18 upon in weighty and important matters in the personal
19 affairs of your own life, then you have no reasonable
20 doubt. If you do not have a reasonable doubt of a
21 defendant's guilt, if you are convinced of his guilt
22 beyond a reasonable doubt, it will be your duty to
23 convict.

24 A reasonable doubt does not mean a positive
25 certainty beyond all possible doubt. If that were the

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1 mpp4 16

2 rule, few persons, however guilty, would be convicted.
3 It is practically impossible for one to be absolutely
4 and completely convinced of any controverted fact
5 which by its nature is not susceptible of proof to a
6 mathematical certainty.

7 Thus, the law in a criminal case requires
8 that if a defendant is to be convicted, his guilt must
9 be established beyond a reasonable doubt, and not
10 beyond all possible doubt.

11 Now, as finders of the fact, to find a
12 defendant guilty on any count of the indictment, the
13 evidence must satisfy you of the guilt of that
14 defendant beyond a reasonable doubt on every essential
15 element of the crime charged, or else you must acquit
16 the defendant of that crime.

17 There are four crimes charged in this
18 indictment, and each of the defendants is named in each
19 one of the crimes. These alleged crimes are set forth
20 in what is known as a count or charge. There are
21 four counts, or charges, in the indictment. Each
22 defendant is charged in each one of these four counts.

23 Now, I will just repeat what I said, that
24 with respect to each count, each charge, you must find
25 the defendant guilty beyond a reasonable doubt with

1957

1 mpp5 17

2 respect to every essential element of the crime that is
3 charged, or else you must acquit him of that count.

4 Now, in the course of my charge I shall
5 instruct you as to what are known as the elements of
6 a particular crime. You may not convict a defendant on
7 any charge unless the government has proven every
8 single element constituting each crime charged beyond
9 a reasonable doubt.

10 For example, if a particular crime has
11 three elements, you must acquit the defendant charged
12 with commission of that crime if you have a reasonable
13 doubt concerning only one of those elements and are
14 convinced beyond a reasonable doubt that he is guilty
15 with respect to the other two.

16 You may not find a defendant guilty of the
17 charges in this indictment if the evidence as to him
18 is that he was merely present when another person com-
19 mitted the crime. This is so even if you find that the
20 defendant who was a spectator knew that his companion
21 was committing a crime but did nothing to stop him.
22 You may feel that such a knowing spectator should alert
23 the police, but his failure to do so does not make him
24 an accomplice of the other.

25 You must acquit the defendant if the evidence

1958

1 mpp6 18

2 does not show beyond a reasonable doubt that he was an
3 active participant in the crime alleged other than a
4 mere spectator.

5 Nor may you convict a defendant merely
6 because he was acquainted with or frequently associated
7 with a person who committed the crime. Guilt by
8 association is frowned upon in our jurisdiction and
9 in our country.

10 The jury must decide this case solely on
11 the evidence presented here in this courtroom. This
12 evidence consisted of -- and I am just going to review
13 the evidence which has been before you, -- the testimony
14 which you have heard, the exhibits which have been ad-
15 mitted into evidence, the stipulations that the attorneys
16 have made among themselves, and matters of which I have
17 taken judicial notice.

18 For example, you heard the testimony of
19 various witnesses during the course of the trial.
20 Some of those witnesses were referred to by counsel
21 during their summations. What I am going to do now is
22 to mention,-- because it has been a long trial, and I
23 think it may be helpful, to just review in the order
24 that they appeared before us the -- the witnesses that we
25 have heard.

1 mpp7 19

2 There was Martha Wigfall, Mark Wigfall,
3 Mary Burch, Kisson Adams, who was also referred to as
4 Kojak, Robert Clemens, who was referred to as Pop,
5 Janet Lee, Glenn Huggins, Lucille Huggins, Ira Huggins.

6 Then there were a group of special agents
7 from the Federal Bureau of Investigation, Agents
8 Gilkerson, Martinez, Quinn, French, Smith, Bertrand,
9 Devine.

10 Then there was Nathaniel Freeman, who was
11 known as Bernard, Special Agents Berry and Petersen,
12 and then Dafne Moore and Walter Moore.

13 Now, the testimony of each of those wit-
14 nesses is evidence which you will consider in the
15 course of your deliberations.

16 There were various exhibits offered by the
17 government and the defendant and admitted into evidence
18 in the course of the trial, and I will not review those
19 exhibits, but a good many of them have been referred to in
20 the course of summations today, and they all will be
21 available to you if you want to see them in the course
22 of your deliberations.

23 Those exhibits are evidence that you will
24 consider in your deliberations.

25 At various times during the course of the

1 mpp8 20

2 trial the government and defense counsel made various
3 stipulations. Those stipulations, whether they were
4 stated or read to you by one of the stenographers or
5 stated by one of the attorneys, were agreements as to
6 the existence of certain facts or agreements that various
7 witnesses if called would testify that certain facts
8 existed.

9 Those stipulations are evidence which you
10 will consider in the course of your deliberations.

11 Now, on at least one occasion during the
12 course of the trial, and I think perhaps more, I took
13 judicial notice of the existence of a fact. The one
14 that I recall is that I took judicial notice of the
15 fact that New York City and South Carolina are in the
16 same time zone.

17 That is evidence which you will consider.
18 That evidence is not binding on you. You will consider
19 it, and you will give it what weight it deserves, just
20 as you will with all other evidence.

21 There are two ways of characterizing
22 evidence which is admitted into court. Some evidence
23 is characterized as direct evidence, and some evidence
24 is characterized as circumstantial evidence.

25 Direct evidence is the testimony of what

1 mpp9 21

2 somebody saw, heard, did, said, something that occurred
3 in the person's presence concerning which he testified
4 before you.

5 Circumstantial evidence is evidence where
6 there has been proof offered of one fact or one group
7 of facts from which one can reasonably decide or infer
8 that another fact existed or that another group of
9 facts exist.

10 Let me give you an example of inferring
11 from one fact or group of facts that another fact
12 exists.

13 Assume that the blinds were closed when
14 you came into the courtroom this morning, but when you
15 sat down, the sun was shining. Now, you had no frame of
16 reference thereafter, because the blinds were closed.
17 You took your seat in the jurybox, and the trial went
18 on in its regular slow, deliberate way, with frequent
19 trips back to the juryroom, where the blinds were
20 drawn.

21 During the course of the morning, assume
22 a person came into the courtroom with a raincoat, and
23 drops of water off the raincoat. Another person came
24 with an umbrella, and he shook water off the umbrella.

25 What you saw were the raincoat and the

1 mpp10 22

2 umbrella and the drops of water. From w
3 you might conclude or infer that after yo
4 the courthouse this morning the sun stopp
5 and it began to rain. The raincoat, the
6 drops of water were facts from which you
7 another fact: that it was raining. They w
8 stantial evidence that weather conditions
9 changed.

10 Now, could you infer instead
11 sprinkler system in the corridor of the c
12 had broken down? Well, arguably you m
13 that the drops of water on the new arriva
14 indicate that; but, given the raincoat an
15 brella and based on your experience, woul
16 reasonable and logical inference to infer
17 people were shaking water off because the
18 system broke down? Do people wear rai
19 carry umbrellas to protect themselves aga
20 sprinkler systems in a United States Gove

21 You may conclude from a fact
22 something that flows from that fact, so l
23 reasonably and logically, and that is all
24 circumstantial evidence.

25 Circumstantial evidence, if y

1 mppl1 23

2 is to be given no less weight in your deliberations than
3 direct evidence.

4 Circumstantial evidence may play an important
5 part in your determination of knowledge and intent,
6 which I shall be discussing later on.

7 We rarely if ever can have direct evidence
8 of what is in a person's mind, but what a person knows,
9 what a person intends may be inferred or gathered from
10 that person's outward manifestations. His conduct,
11 his words, his acts and the objective facts and circum-
12 stances disclosed by the testimony and exhibits in
13 evidence, if you credit the testimony and the exhibits,
14 may constitute circumstantial evidence from which you
15 may infer a state of mind, if the inference logically
16 and reasonably flows from the evidence.

17 If you find, for example, that a defendant
18 when questioned by a law-enforcement official made any
19 deliberately false statement, you may consider such
20 false statement as circumstantial evidence from which
21 consciousness of guilt or criminal intent may be infer-
22 red.

23 Whether or not evidence as to a defendant's
24 explanation or statement points to consciousness of
25 guilt and the significance to be attached to any such

1 mpp12 24

2 evidence are matters for you to determine.

3 In this case, direct evidence and circum-
4 stantial evidence have been placed before you. The
5 government contends that the evidence as a whole establishes
6 the defendants' guilt on each crime charged.

7 Each defendant contends that no evidence
8 has overcome the presumption of his innocence and that
9 there is at the very least a reasonable doubt of his
10 guilt.

11 Whether a defendant is guilty or not must be
12 determined by you beyond a reasonable doubt, solely upon
13 the evidence or the lack of evidence and the reasonable
14 inferences that you find flow from the evidence that is
15 before you or that you find flow from the lack of such
16 evidence.

1965

9 1 gtrl 25

2 In the determination of whether each of the
3 defendants is guilty or not guilty, you must bear in
4 mind that guilt is personal and individual. The
5 innocence or guilt of Mr. Burnell with respect to the
6 charges against him in each of the four counts of the
7 indictment must be determined solely with respect to him
8 and solely on the evidence or lack of evidence with
9 respect to him. This determination must be made
10 separately and independently of any determination of the
11 innocence or guilt of Mr. Moore.

12 And the innocence or guilt of Mr. Moore
13 with respect to each of the four charges must be
14 determined solely with respect to him and solely on the
15 evidence or lack of evidence with respect to him. This
16 determination must be made separately and independently
17 of any determination of the innocence or guilt of Mr.
18 Burnell.

19 The case with respect to each defendant
20 stands or falls on the proof or lack of proof of the
21 charges against him and not upon proof or lack of proof
22 that may be available or might have been brought of
23 the charges against somebody else.

24 You must make your own evaluation of the
25 evidence, including the testimony by each of the witnesses,

1 gtr2 26

2 and determine the degree of weight you choose to give such
3 evidence. It is for you to determine from the testimony
4 and the demeanor on the stand of a witness whether or not
5 he has given truthful, reliable testimony or whether he
6 has, unintentionally or otherwise, embroidered the truth
7 or falsified, exaggerated or suppressed material facts,
8 and, thus, given an unreliable story.

9 Now let us focus for a minute on this question
10 of evaluating testimony.

11 In evaluating testimony by a witness, you
12 may consider the following facts:

13 The interest or the lack of interest of that
14 witness in the outcome of this case; the bias or the
15 prejudice of the witness, if you find that he or she
16 has one; the relationships with respect to this case
17 which the witness had with the alleged victim, Buster
18 Huggins, or with either of the defendants, if any; the
19 appearance or the manner in which the witness gave
20 testimony on the stand; the opportunity that the witness
21 had to observe and note the facts concerning which he or
22 she testified; the probability or the improbability of the
23 testimony of that witness when viewed in light of all of
24 the evidence in the case; any problems the witness may have
25 had in expressing himself or herself in making himself or

1967

1 gtr27

2 herself understood; changes in the witness' story as he
3 testified or she testified before you, if there were
4 such changes.

5 Now, those are some, and certainly not all, of
6 the factors that could be and perhaps should be taken
7 into consideration by you in determining the weight, if
8 any, which you will assign to a witness' testimony.
9 Your own common sense will suggest other criteria.

10 The testimony of a witness may fail to conform
11 to the facts because he is intentionally telling a
12 falsehood. That testimony may also fail to conform
13 to the facts as they actually occurred because the witness
14 did not accurately see or hear that about which he
15 testified. It may also fail to conform because the
16 witness' recollection of the event is faulty. It may
17 also fail to conform because the witness has not expressed
18 himself clearly in giving testimony.

19 You should consider a witness' entire
20 testimony, his direct examination, cross-examination,
21 redirect examination. You should consider the strength
22 or weakness of his recollection in the light of all the
23 testimony and attendant circumstances in the case.

24 Inconsistencies or discrepancies in the
25 testimony of a witness or between the testimony of different

1968

1 qtr28

2 witnesses may or may not cause you to discredit his
3 testimony or that testimony.

4 Two or more persons witnessing an
5 incident or transaction may see it or hear it differently.

6 Innocent misrecollection, like failure of
7 recollection, is not an unusual experience.

8 In weighing the effect of a discrepancy,
9 consider whether it pertains to a matter of importance or
10 to an unimportant detail and whether the discrepancy
11 results from innocent error or wilful falsehood.

12 Reflect on the witness' demeanor on the
13 stand, his or her apparent candor or lack of candor.

14 Did the witness comport himself or
15 behave one way on direct examination and substantially
16 differently on cross-examination?

17 Did that witness contradict himself or
18 herself on the stand?

19 Did that witness' testimony differ from
20 his or her prior statements on the same issue?

21 Was that witness' memory of the events
22 better or worse at the time of trial or when he or
23 she gave a different account than that given at trial?

24 You are also entitled to consider, and I think
25 I may have mentioned this, the possibility that inconsistent

1969

1 gtr29

2 statements may be the result of an innocent mistake
3 or lapse of memory rather than a deliberate intention
4 to falsify or to shade the facts. It is not unusual
5 to have such inconsistencies.

6 If your consideration of the evidence
7 makes it appear that there are differing versions of
8 the facts resulting in a discrepancy in the evidence,
9 you will have to consider as the sole judges of the
10 facts whether the discrepancy involves understandable
11 error which can be reconciled by fitting the differing
12 versions into a rational relationship, or, if that is
13 not appropriate or possible, which of the conflicting
14 versions you will accept.

15 If you find that any witness has testified
16 falsely as to a material fact before you, the law permits
17 you to disregard completely the entire testimony of that
18 witness on the principle that one who testifies falsely
19 on one material matter is quite likely to testify
20 falsely about everything.

21 However, you are not required to consider
22 such a witness totally unworthy of belief. You may,
23 if you wish, accept so much of his or her testimony as you
24 believe true and reliable and disregard that which you
25 believe is false or unworthy of acceptance.

1 gtr30

2 A prior inconsistent statement which was
3 made under oath before a grand jury may be considered
4 by you both as affirmative proof of the facts in that
5 testimony as well as impeaching the credibility of the
6 witness on the stand.

7 In the course of this case, the only witness
8 with respect to whom we had both testimony here on the
9 stand and prior grand jury testimony was Mary Burch.

10 You may, if you so choose, consider Miss
11 Burch's grand jury testimony as substantive or affirmative
12 evidence in support of the charges made in the indictment,
13 as well as evidence impeaching her credibility as a witness
14 here.

15 Thus, if you find her grand jury testimony
16 given under oath to be inconsistent with her testimony
17 here, you may then consider that grand jury testimony
18 affirmatively for any and all purposes in resolving
19 the fact issues in this case.

20 Now, other prior inconsistent statements --
21 and we did have other statements in this case where a
22 witness testified here and on a prior occasion he made a
23 statement which was inconsistent with that -- none of
24 those, my recollection was that none of those were under
25 oath, and those statements can only be considered for

1971

1 gtr31

2 purposes of determining the credibility of the witness
3 here, they cannot be considered as affirmative evidence
4 for you to consider on the issues of this case.

5 In other words, if a person testified as to
6 a fact here and previously testified as to the contrary
7 of that fact and the evidence of his prior statement
8 which was not under oath was admitted here, it was admitted
9 only for the purpose of attacking his credibility.

10 You would have before you the question of
11 whether or not to believe his testimony here. In
12 deciding whether or not to believe his testimony here,
13 you could consider his prior statement. But you could not
14 reject his statement here and substitute his prior
15 statement as evidence on the issues of this case.

16 In Mary Burch's case, because her prior
17 testimony before the grand jury was under oath, you could
18 do just that.

19 If a witness has denied making a prior state-
20 ment not under oath, you may not then consider that prior
21 statement for any purpose unless it is introduced into
22 evidence here, and you must disregard it completely
23 unless the statement was proven by other independent
24 evidence in the case, such as by the testimony of another
25 witness.

1972

1 gtr32

2 If one witness has denied making a prior
3 statement which was not under oath and then another
4 witness has testified that the statement was, in fact,
5 made, you may, if you choose, consider the inconsistent
6 statement testified to by the second witness only
7 as bearing on the credibility of the first witness and
8 for no other purpose.

9 Part of the government's evidence in
10 this case consisted of voice identifications of the
11 defendants by a number of witnesses. Specifically,
12 various witnesses testified that the two defendants
13 here were the speakers on the tape recorded calls
14 contained on Government's Exhibits 1 and 2. And it is
15 my recollection that there was at least one witness,
16 and perhaps more, who identified one of the defendants
17 here as being the speaker on an unrecorded call to South
18 Carolina.

19 It is for you, as the jury, as the triers of
20 the fact, and only for you to assess the reliability
21 of these voice identifications in accordance with the
22 general principles governing the credibility of witnesses
23 which I have explained.

24 You are to give voice identification testimony
25 as much or as little weight as you see fit within the

1973

1 gtr33

2 bounds of reasonableness and in light of all the testimony
3 in the case.

4 For example, you can consider the opportunity
5 which a witness had to become familiar with the speaker's
6 voice, its peculiarity, the acuteness of the witness'
7 hearing, the circumstances under which the speaker's voice
8 was heard, when the witness first heard the speaker's
9 voice, the length of the witness' acquaintanceship with
10 the speaker and so on.

11 A witness can base a voice identification
12 on subsequent acquaintanceship with the speaker or his
13 voice as well as on past acquaintanceship.

14 Actually, voice identification can be based
15 on hearing the speaker's voice at any time and under any
16 circumstances.

17 In assessing the weight to be given by you to
18 such testimony, you may also examine the general credi-
19 bility of each witness by the standards I have already
20 discussed.

21 Ask yourselves whether the totality of
22 circumstances leading to the voice identification was or
23 was not suggestive to the witness.

24 I think perhaps to put this in round sum,
25 there are no standards or criteria which you are required

1974

gtr34

to apply in determining the reliability of voice identification testimony. Rather, you should apply your common sense and life experience to judge the reliability of voice identification testimony and the credibility of the witnesses giving such testimony and give such testimony then such weight, greater or less, as you find it deserves.

Now I would like to turn to the indictment and the federal statutes that are involved in the indictment.

The indictment I have already discussed and have explained to you what it is. It is a set of pieces of paper that set forth certain information and it has absolutely no weight so far as evidence is concerned. It is not evidence and it carries no load at all in this trial. The only function it serves is to tell the defendants what they are charged with and tell you what the defendants are charged with.

The indictment uses the term Southern District of New York. That is a federal geographic district which, for our purposes in this trial, includes Manhattan and the Bronx and Westchester.

The indictment contains four counts. Harold Burnell and Venkirk Moore are named in each of

1 gtr35

2 counts 1 through 4. Each of these counts charges a
3 separate offense or crime. Each must be considered
4 separately with respect to each defendant.

5 Of course, the fact that you may find a
6 given item of proof or evidence bears on one count
7 does not prohibit you from finding that it bears on
8 one or more other counts as well.

9 I have already told you that guilt is
10 personal. The guilt of each defendant on trial before
11 you must be determined separately with respect to him
12 solely on the evidence presented or the lack of
13 evidence.

14 The case of each defendant on trial stands
15 or falls on the proof or the lack of proof of the
16 charges against him and not against somebody else.
17 But in considering the question of guilt of each
18 defendant, you may have to determine the nature of the
19 participation, if any, of the other defendant.

20 The first count of the indictment, which
21 I will refer to for convenience as the first conspiracy
22 count, charges that from about November 1, 1976, until
23 the date of the indictment, which was December 14, 1976,
24 Harold Burnell and Wankirk Moore conspired to violate
25 federal kidnapping statute.

1975

1 gtr36

2 The second count, which we will
3 convenience a substantive count, charges bot
4 Burnell and Moore, with the kidnapping of Bu
5 on or about December 1, 1976.

6 Now, I said there were four coun
7 go in seesaw order. There is a conspiracy
8 substantive count, a conspiracy count, a sub
9 count.

10 Count 3, which I will call the s
11 conspiracy count, charges that from about No
12 1976, the defendants conspired to violate fe
13 extortion laws.

14 Count 4 charges the transmittal
15 commerce of a communication, specifically a
16 call from New York to South Carolina, contain
17 and request for ransom for the release of a
18 person, Buster Huggins.

19 Now, I say we will call counts 1
20 conspiracy counts; counts 2 and 4 the substan

21 Each of the substantive counts,
22 charges that each of the defendants aided and
23 other in the commission of the crime alleged

24 Now I will discuss the law with
25 aiding and abetting later, but let me talk fo

1 gtr37

2 about substantive counts and conspiracy counts.

3 Ladies and gentlemen of the jury, this
4 is a long charge and I know you have been listening
5 all day. Would you prefer to take a ten-minute recess
6 at this point or shall I continue?

7 JUROR NO. 2: It is up to you, your Honor.

8 THE COURT: Why don't I go on and if anyone
9 feels they need a break let me know.

10 MR. HOCHHEISER: Do we get a vote, Judge?

11 THE COURT: You get no vote, no, sir.

12 Substantive counts and conspiracy counts
13 are governed by different principles.

14 A substantive count charges a specific
15 violation of law.

16 A man is charged with kidnapping. That is a
17 substantive charge.

18 A substantive count charges, generally
19 speaking, specific illegal conduct; kidnapping, an attempt
20 to extort a ransom payment.

21 In the conspiracy count, the offense charged
22 is an agreement or an understanding between two or more
23 persons to commit a violation of a particular substantive
24 law.

25 For example, count 1 charges a conspiracy

1973

1 gtr38

2 to kidnap. There is a substantive law which prohibits
3 kidnapping.

4 Count 3 charges a conspiracy to extort a
5 ransom. There is a substantive law that prohibits
6 extortion of ransom payments.

7 What is the difference between the crime of
8 conspiracy and a substantive crime?

9 They are, as I say, entirely separate and
10 different.

11 A conspiracy to commit a crime is an entirely
12 separate and different offense from the substantive
13 crime which is the object of the conspiracy.

14 The essence of the crime of conspiracy
15 is an agreement or an understanding to violate other laws.
16 If such a conspiracy exists, even if it should fail of its
17 purpose, it is still punishable as a crime.

18 Why is there under the law a separate and
19 distinct crime of conspiracy?

20 A conspiracy is collective criminal activity.
21 More than one person participates. It, therefore,
22 presents a greater potential threat to the public
23 and usually is more difficult to detect than criminal
24 activity of a single individual. And because of
25 this and other reasons, a conspiracy or concerted actions

1 gtr39

2 of two or more persons to violate the federal laws
3 has been made a separate crime entirely distinct
4 from the substantive crime which may be the underlying
5 object of the conspiracy.

6 Where a conspiracy or unlawful agreement is
7 charged, it is not necessary to prove that there was an
8 actual violation of the substantive law which was the
9 object of the conspiracy.

10 Thus, under count 1, which charges a conspiracy
11 to kidnap, it is not necessary for the government to prove
12 that there was a kidnapping, and under count 3, which
13 charges conspiracy to extort a ransom, it is not necessary
14 for the government to prove that there actually was an
15 extortion of ransom or an attempt to extort a ransom.

16 On the other hand, a substantive count or
17 crime is one under which specific action is alleged
18 which violates the law, and the government must prove
19 the violation.

20 Thus, under count 2 of the indictment,
21 the government must prove a kidnapping, and under count 4
22 the government must prove an attempt to extort money or
23 collect a ransom.

24 In short, the conspiracy charges relate to
25 unlawful combinations or agreements to commit crimes,

1 gtr40

2 whereas the substantive counts charge actual completed
3 crimes.

4 Whether or not the defendants accomplished
5 what it is alleged they conspired to do is immaterial to
6 the question of the guilt on the conspiracy counts,
7 counts 1 and 3.

8 Since the essential elements which the
9 government must prove before a conviction may be had are
10 different in the case of each crime, I shall consider
11 each separately. I will begin with the two conspiracy
12 counts and I will then discuss the two substantive
13 counts.

14 It is important that the jury remember that
15 in considering the charges against these defendants,
16 they must analyze these charges in terms of the elements
17 that must be proved with respect to each charge, because
18 each element must be proved beyond a reasonable doubt.

19 Although, as I have said, the conspiracy
20 counts charge that the defendants committed crimes which
21 are separate and distinct from the substantive violations
22 of law charged in counts 2 and 4, this does not prevent
23 you as the jurors from considering proof of the actual
24 violations that are alleged in the substantive counts as
25 evidence that a conspiracy may have existed.

1 gtr41

2 Count 1 -- and perhaps the best way to focus
3 on this is to go right to the indictment -- count 1,
4 which is the first conspiracy charge, reads, in substance,
5 as follows:

6 I am not going to read the whole count, I am
7 just going to try to read enough of it that I will be
8 able to communicate what it has to say.

9 The grand jury charges that from about November
10 1, 1976 until the filing of the indictment, in the
11 Southern District of New York, Harold Burnell and Vankirk
12 Moore unlawfully, wilfully and knowingly did conspire,
13 confederate and agree to violate the law.

14 It was a part of this conspiracy that
15 Harold Burnell and Vankirk Moore unlawfully, wilfully
16 and knowingly would seize, kidnap and carry away and
17 hold for ransom Henry Huggins and would wilfully transport
18 said person in interstate and foreign commerce.

19 That, in substance, is what is alleged in
20 count 1 of the conspiracy. It alleges that the two
21 defendants on trial here conspired to violate the kidnapping
22 law by kidnapping Buster Huggins.

23 Perhaps I ought to read count 3 and we can
24 take up the elements of the conspiracy count together.

25 Count 3, which is the second conspiracy count,

1982

1 gtr42

2 reads, in substance, as follows:

3 The grand jury further charges that from about
4 November 1, 1976 until the filing of the indictment,
5 in the Southern District of New York, and elsewhere,
6 Harold Burnell and Vankirk Moore did conspire and agree to
7 commit certain offenses in violation of law.

8 It was part of the conspiracy that
9 Burnell and Moore unlawfully, wilfully and knowingly
10 would transmit in interstate commerce a communication
11 containing a demand and request for ransom and reward
12 for the release of a kidnapped person, Henry Huggins.

13 It was further a part of the conspiracy that
14 Burnell and Moore wilfully and knowingly would use a
15 facility in interstate commerce to facilitate the promotion,
16 management, establishment and carrying on of an unlawful
17 activity, to wit, extortion in violation of law, and
18 thereafter would perform acts to promote and facilitate
19 the promotion and carrying on of said unlawful activity.

20 In short, count 3, the second conspiracy count,
21 charges a conspiracy to use interstate communication
22 facilities, the telephone, to assist in attempting to
23 extort a ransom payment.

24 Now, there are three essential elements with
25 respect to each of the conspiracy charges, and the government

1 gtr43

2 must prove each of the elements beyond a reasonable doubt
3 as to count 1 and count 3.

4 If it fails to establish any essential element
5 beyond a reasonable doubt, you must acquit. If the
6 government succeeds in proving every element beyond a
7 reasonable doubt on either count 1 or count 3 your
8 duty is to convict on that count.

9 In order to prove the crime of conspiracy
10 as separately alleged in counts 1 and 3, the government
11 must establish the following elements beyond a reasonable
12 doubt separately as to each count.

13 First, you must find the existence of the
14 conspiracy charged.

15 Second, you must find that with respect to
16 each defendant, he knowingly and wilfully associated
17 himself with the conspiracy.

18 And, third, you must find that one of the
19 members of the conspiracy, that is, either of the
20 defendants, committed, in the Southern District of New
21 York, in Manhattan, the Bronx or Westchester, at least
22 one overt act in furtherance of the conspiracy to achieve
23 the objects of the conspiracy.
24
25

1 mpp 44

T10

2 Now, I will refer to the overt acts a little
3 later.

4 If the government fails to establish each
5 essential element beyond a reasonable doubt, you must
6 acquit the defendants on that count.

7 If you find that the government has
8 established and proved beyond a reasonable doubt each
9 of these three elements with respect to either count,
10 you must convict the defendant on that count.

11 Now, I know at this point that, except as I
12 shall indicate in a moment, all evidence of statements
13 and activities by the alleged conspirators which was
14 received in the early part of the trial is now before
15 you, and it may be considered by you in determining the
16 existence or non-existence of the conspiracy alleged
17 in Counts 1 and 3 and the participation or non-
18 participation of the defendants. The one exception is
19 this:

20 There was evidence offered by the government
21 in the course of this trial of statements made by the
22 defendants after their arrest. Now, effectively the
23 arrest of a person generally terminates his participation
24 in a conspiracy, if he ever participated in the con-
25 spiracy. It is an affirmative act of termination.

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2 The government offered in evidence certain statements
3 that were allegedly made by the defendants after they
4 were arrested. Those post-arrest statements of one
5 defendant are not to be considered with respect to the
6 other defendant.

7 Now, I just want to say something, and this
8 doesn't follow the course of what I was talking about,
9 which was the elements of the conspiracy, but while it
10 occurs to me let me say this:

11 I have been talking about these post-
12 arrest statements. There has been testimony that one
13 or both of these defendants were read their rights and
14 failed to sign or refused to sign a waiver.

15 You may consider the fact that a defendant
16 refused to sign a waiver on the question of whether any
17 statement he made was voluntary or not. You may consider
18 it on the question of whether he did or did not make the
19 statement. The decision as to whether he did or did not
20 make the statement and the weight to be given that state-
21 ment, if you find that he did make the statement -- the
22 question of whether he did or did not make it, of course,
23 is a question for you to determine, and if you find that he
24 did make it you may give the statement such weight as you
25 think it deserves, considering all the circumstances that

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2 were brought out in the evidence in the case.

3 Now, let's look at these elements of the
4 crime of conspiracy.

5 The first element is the existence of the
6 conspiracy. Did a conspiracy exist?

7 Now, the gist of the crime of conspiracy
8 is an unlawful combination or agreement to violate the
9 law. Whether or not the defendants accomplished what
10 it is alleged they conspired to do is immaterial to the
11 question of whether there was or was not a conspiracy,
12 and it is ultimately immaterial on the question of
13 guilt or innocence under the conspiracy count.

14 A conspiracy is, quite simply, an informal,
15 undocumented understanding for criminal purposes, in
16 which each member of the conspiracy becomes an agent
17 of every other member.

18 Now, I used the words "informal and un-
19 documented." To establish a conspiracy, the government
20 is not required to show that two persons sat around a
21 table and entered into a solemn contract in writing or
22 orally stating that they have formed a conspiracy to
23 violate the law, setting out the details of the plan,
24 the means by which the project, the unlawful project,
25 would be carried out, or the part to be played by each

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2 conspirator. It would really be extraordinary if such
3 an agreement was made, if it was made orally or in
4 writing.

5 Your commonsense will tell you that when
6 men and women undertake to enter into a criminal con-
7 spiracy, much is left unexpressed. Conspirators do not
8 usually reduce their agreements to writing. They do not
9 usually acknowledge them before a Notary Public. They
10 do not publicly broadcast their plans.

11 From its very nature, a conspiracy is almost
12 invariably secret in its origin, secret in its execution.

13 It is sufficient if two or more persons --
14 and in this case we are talking about two persons -- in
15 any manner, through any contrivance, impliedly or tacitly,
16 come to a common understanding to violate the law.
17 Express language, specific words are not required to
18 indicate assent or attachment to a conspiracy.

19 In determining whether or not there has been
20 an unlawful agreement, you may judge acts and conduct
21 of the alleged co-conspirators which are alleged to be
22 done to carry out the criminal purpose. The ancient
23 adage, "Actions speak louder than words," is applicable
24 here.

25 Usually, the only evidence available is of

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1 . mpp 48

2 disconnected acts. These disconnected acts, however,
3 when considered in connection with one another, may
4 show a conspiracy to secure a particular result as
5 satisfactorily and directly and conclusively as more
6 direct proof.

7 The offense of conspiracy is complete:

8 1. When such unlawful agreement is made
9 and

10 2. When any single overt act to effect the
11 object of the agreement is thereafter committed by at
12 least one co-conspirator.

13 Now, although the objectives of a conspiracy
14 need not be accomplished for the conspiracy to exist
15 and hence for the crime of conspiracy to be committed,
16 proof concerning the accomplishment of the objects of a
17 conspiracy may be the most persuasive evidence of the
18 existence of the conspiracy itself. Success of the
19 venture, if you believe it to have been successful,
20 may be the best proof of the existence of the conspiracy.

21 In determining whether the conspiracies
22 charged in Count 1 and Count 3 of this indictment actually
23 existed, you may consider the evidence of the acts and
24 conduct of the alleged conspirators as a whole and the
25 reasonable inferences which you decide may be drawn from

1 mpp 49

2 that evidence.

3 The burden of establishing beyond a re
4 doubt the existence of a conspiracy in which the d
5 ants were members rests on the government.

6 An unlawful conspiracy may exist even
7 its purposes are not accomplished. Of course, the
8 ment here contends that the purposes of the conspi
9 to kidnap alleged in Count 1 were accomplished and
10 Buster Huggins was in fact kidnapped. It also con
11 that while the purpose of the conspiracy to extort
12 alleged in Count 3, was not completely accomplished
13 efforts to extort money by demanding ransom were m

14 Evidence that a conspiracy's purposes w
15 accomplished or efforts to accomplish those purpos
16 were made may be considered by you if you find the
17 is such evidence as proof of the existence of the
18 spiracy.

19 Now, if we use those principles to gu
20 or if you use those principles to guide you, you
21 determine with respect to each of the conspiracies
22 in Count 1 and Count 3 whether or not proof beyond
23 reasonable doubt has established the existence of
24 conspiracy or agreement that is charged in the in
25 ment. In deciding this, you must consider all th

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evidence with respect to the conduct, and declarations of each of the defendants or alleged conspirators and such inferences reasonably draw from that evidence.

With respect to each of the alleged in the indictment, in Count 1 and on consideration of the evidence you find no reasonable doubt that the minds of the conspirators met in an understanding way and agreed, as I have explained a conspiracy to you, to work together in furtherance of the scheme alleged, then proof of the existence of the conspiracy is complete.

Now, I have said that a conspiracy is an agreement or a combination to violate the law. In Count 1, the alleged purpose of the conspiracy is to violate the statute which prohibits kidnapping. The statute provides in substance that it is a crime to carry away and hold for ransom any person if that person is wilfully transported in interstate commerce.

To find that the conspiracy exists, you must find that the purpose of the conspiracy was to violate the law against kidnapping. It is not necessary that a kidnapping in

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1 Under Count 3 of the conspiracy, the alleged
2 purpose of the conspiracy was to violate the statute
3 prohibiting using any facility in interstate commerce,
4 including the telephone, for purposes of extorting money
5 and demanding ransom. To find that the conspiracy alleged
6 in Count 3 exists, you must find that the purpose of the
7 conspiracy was to violate the law against using facilities
8 in interstate commerce to attempt to extort or demand
9 a ransom payment, even though it is not necessary that
10 money was actually extorted or received or even that a
11 demand was actually made.
12

13 In essence, the question is: what is the
14 nature of the agreement or understanding? That is for
15 you to determine after examining all the evidence.

2 16 In determining whether the conspiracy charged
17 in the indictment existed between the defendants, you
18 must decide as to each defendant individually whether he
19 joined the conspiracy with knowledge of its purposes.

20 Now, I have said there were three elements,
21 the first element being the existence of the conspiracy.
22 Did the conspiracy exist? Did the conspiracy come into
23 being?

24 The second element is: did the defendant
25 we are now considering, whichever one it is, join the

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2 conspiracy?

3 Then, the third element is: was an overt
4 act done in furtherance of the conspiracy by one of the
5 conspirators?

6 We have been talking about the first element,
7 the existence of the conspiracy. Now, what we are
8 really looking at is sort of a marriage or a merger
9 or a blending of the first element and the second
10 element.

11 There must be at least two persons involved
12 for a conspiracy to exist. I cannot conspire with myself.
13 In the particular case before us, the government has
14 alleged a conspiracy and for all practical purposes
15 has alleged that there were only two conspirators:
16 the two defendants. So we will have, as I will develop
17 in just a moment, a situation where the conspiracy can
18 only exist and element 1 can only be satisfied, if each
19 of the defendants joined the conspiracy. That is the
20 second element: did the defendant join the conspiracy?

21 So in determining whether the conspiracy
22 charged existed between the defendants, you must decide
23 as to each defendant individually whether he joined the
24 conspiracy with knowledge of its evil purposes.

25 While, as I just said, this is a separate

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2 element, element 2 of the crime of conspiracy, there was
3 no proof during the course of this trial that there
4 were other conspirators than the two defendants.

5 Thus, the very existence of the conspiracy alleged in
6 Count 1 and Count 3 turns on whether there was a
7 conspiratorial agreement between the two defendants.

8 So at this stage, element 1, the existence
9 of the conspiracy, and element 2, did the defendant
10 join the conspiracy with knowledge of its purposes,
11 merge, because if you find that either defendant did not
12 participate in the conspiracy with knowledge of its
13 evil purpose -- that is the second element -- then the
14 conspiracy never existed, because there was no agreement
15 or understanding between the two persons who are alleged
16 to be conspirators. That is element 1.

17 But although elements 1 and 2 do for practical
18 purposes merge for the reasons I just set forth, the jury
19 must, to satisfy the second element of the crime of
20 conspiracy, determine individually with respect to each
21 of the defendants whether or not the defendant participated
22 in the conspiracy with knowledge of its unlawful pur-
23 poses and in furtherance of its unlawful objectives.

24 Now, of course, if you find that no con-
25 spiracy existed as a conspiracy is alleged in Count 1

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2 and Count 3 of the indictment, then that would end the
3 matter, and it would be unnecessary for you to consider
4 any other element of the conspiracy counts, and you
5 should acquit both defendants under Counts 1 and 3.

6 Now, to find a defendant's membership in a
7 conspiracy, you must find that he knowingly and wilfully
8 participated therein. In this connection, let us talk
9 for a minute about "knowingly and wilfully." I don't
10 say that these are definitions, but this will be a useful
11 tool to consider with respect to these words.

12 An act is done knowingly if it is done
13 voluntarily and purposely, not because of mistake,
14 accident, mere negligence or some other innocent reason.

15 An act is done intentionally if it is done
16 knowingly, deliberately and, in the context of alleged
17 violation of law, with an evil motive or purpose.

18 An evil motive or purpose is something that
19 you cannot see. A man does not go around carrying a sign
20 or distribute handbills saying, "Now, I have an evil
21 motive or purpose." There is no way known to find out
22 directly what is in a man's mind.

23 You decide whether or not one has an evil
24 motive or purpose by looking at everything that you believe
25 or credit that has been said about his activities and

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2 decide whether or not all those activities, all the
3 evidence that you believe about his activities satisfies
4 you beyond a reasonable doubt that his motive or purpose
5 in acting as he did was evil within the terms as I have
6 defined them.

7 "Evil" in the context of this case means an
8 intentional violation of or an intentional conspiring
9 to violate the laws of the United States. It does not
10 mean conduct that you don't approve of.

11 The question of intent is one of fact. The
12 question of wilfulness is one of fact.

13 Clearly, this concerns what is in a man's
14 mind and the purpose which motivates a person in his
15 course of conduct.

16 Medical science has not yet devised an
17 instrument to record criminal or wilful intent. It is
18 a mental process and attitude. Direct proof is usually
19 not available. Intent, motive are determined from the
20 acts, conduct and circumstances and such reasonable
21 inferences as can be drawn from them.

22 If you find circumstances of secrecy, intrigue,
23 deviousness, attempts to conceal by false statements or
24 otherwise the real nature of the transaction, you may
25 consider those along with other evidence in the case

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as showing consciousness of guilt.

The government must prove beyond a reasonable doubt that a defendant, aware of its basic purposes and objects, entered into one or both of the conspiracies charged in the indictment with a specific criminal intent, that is, with a purpose to violate the law. So, if a defendant, with understanding of the unlawful character of the alleged conspiracy, intentionally engages, advises or assists in it for the purpose of furthering the illegal undertaking, he thereby becomes a knowing and wilful participant; he therefore becomes a conspirator.

If you do find knowing and wilful participation in the conspiracy, the extent of that participation is immaterial. It doesn't make any difference whether one is a main conspirator or a secondary conspirator. If one participated in a conspiracy, his guilt is equal, and that is all there is to it.

I think, ladies and gentlemen, that I will take a break here for about ten minutes. This has been a long charge. It will not be too much longer, but I think it will be useful if we take a 10-minute break at this time.

(Recess.)

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2 THE COURT: Ladies and gentlemen of the jury,
3 were discussing element No. 2: participation in a
4 conspiracy.

5 Mere knowledge by a defendant of any illegal
6 act on the part of the other defendant or mere association
7 by one defendant with the other defendant or mere
8 unwitting participation by one defendant in the
9 activities of the other defendant -- none of those
10 is sufficient to establish membership in a conspiracy.
11 The government must establish beyond a reasonable
12 doubt that the defendant you are considering was aware
13 of the basic purposes and objectives of this prospective
14 conspiracy and that he entered into a conspiracy with the
15 other defendant with a purpose to violate the law.

16 So the question you must consider is: did
17 the defendant you are considering act wilfully and with
18 knowledge that his acts were or would be an integral
19 part of the alleged unlawful enterprise and that they would
20 help carry it forward?

21 You must find that this defendant you are
22 considering knew what the unlawful purposes of the
23 prospective conspiracy were and intended to become a
24 member of it, as distinguished from acting exclusively
25 on his own.

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1
2 You do not have to find before you may con-
3 sider the defendant you are considering as having become
4 a member of the conspiracy -- you do not have to find that
5 he knew that the basic purposes of the conspiracy if
6 accomplished would violate Federal law, nor do you have
7 to find that the acts which constituted his participation
8 in the conspiracy were themselves crimes or were them-
9 selves substantive violations of law. If a person with
10 an understanding of the unlawful character of the
11 conspiracy intentionally engages in, advises or assists
12 the undertaking for the purpose of furthering it and
13 making himself a part of it, he then becomes a knowing and
14 wilful participant. He becomes a conspirator.

15 Now, a single act of a person such as a
16 telephone call may be sufficient to draw him within the
17 ambit of the conspiracy. However, since conviction for
18 conspiracy requires an intent to participate in an unlawful
19 enterprise, the single act itself must be such that you
20 may reasonably infer from that act such an intent to
21 participate, or there must be evidence tending to prove
22 that the person had knowledge of the objectives of the
23 prospective conspiracy and that his act was intended
24 to be and was in furtherance of the objectives or the
25 purposes of the conspiracy.

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2 With respect to inferences which may be drawn
3 from the single act I have just been talking about, you
4 may consider, among other things, the purpose of the act,
5 the circumstances under which the act was done or per-
6 formed, the knowledge of the overall schemewhich the act
7 indicated, all as bearing on the intent of the defendant
8 t you are considering to participate in a conspiracy.

9 It requires -- and I think I have said this
10 before -- a minimum of two persons to constitute a con-
11 spiracy. If one of the defendants knowingly and wilfully
12 enters into an unlawful agreement with the other defendant
13 to violate the law -- and this is what is alleged in
14 Count 1 and Count 3 -- and the other defendant has entered
15 into the same unlawful conspiracy knowingly and wilfully,
16 there is an unlawful agreement or conspiracy. Each of them
17 has become a party thereto. The question is: did each
18 of the defendants join the other in the conspiracy with
19 an awareness of at least some of its basic purposes and
20 aims? If so, then the law treats each as a full member
21 of the conspiracy, and he becomes liable for the past and
22 future acts of his co-conspirator.

23 Now, in determining whether the defendants
24 became members of a conspiracy, you may consider all of
25 the evidence before you with the exceptions that I have

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2 already discussed.

3 In determining whether either defendant was
4 a party to the conspiracy, and in the particular case
5 before this jury, hence, in determining whether there
6 was a conspiracy, because if either of these men were
7 not in the conspiracy there was no conspiracy -- in
8 determining whether either defendant was a party to the
9 conspiracy, he is entitled to individual consideration
10 of the proof respecting him, including any evidence
11 of his knowledge or lack of knowledge, his activity,
12 his participation in key conversations or lack of
13 participation, his participation or non-participation
14 in the plans, schemes, agreements alleged.

15 The guilt of a conspirator is not governed
16 by the extent or duration of his participation in the
17 conspiracy or whether he had knowledge of all of its
18 operations. Even if one was engaged in the conspiracy to
19 a more limited degree than his co-conspirator, he is
20 equally culpable or liable so long as he was a co-
21 conspirator.

22 Each member of a conspiracy may perform
23 different and separate and distinct acts at different
24 times, at different places. Some conspirators may play
25 major roles; some may play minor roles. In our particular

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2 situation we are still only dealing with two conspirators,
3 but each conspirator is held responsible for all that
4 may be done during the existence of the conspiracy
5 and while he remains a member.

6 Simply stated, by associating himself with
7 the conspiracy he assumes equal responsibility for all
8 the activities of the other member of the conspiracy.

9 When persons enter into a conspiracy to
10 accomplish an unlawful end, they become agents for one
11 another in carrying out the conspiracy, and the acts
12 or declarations of one in the course of the conspiracy
13 in furtherance of the purposes of the conspiracy are deemed
14 to be the acts of the other, and both are responsible for
15 those acts.

16 Thus, if you find in accordance with these
17 instructions that the alleged conspiracy existed with the
18 defendants as participants, acts done and statements
19 and declarations made in furtherance of the conspiracy
20 by either one may be considered against the other,
21 even though such acts or declarations were made in the
22 absence of the other and without the other's knowledge.

23 It is important to note that this principle
24 applies only to acts and declarations done or made during
25 the continuation of the conspiracy and in furtherance of

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2 the purposes of the conspiracy to carry out an unlawful
3 objective or purpose of the conspiracy.

4 The principle does not apply to acts and
5 declarations that do not have those characteristics,
6 but if you find that a defendant is a conspirator, then
7 however limited his role in furthering the objectives
8 of the conspiracy, he is responsible for all that was
9 done in furtherance of the conspiracy during its con-
10 tinuance.

11 Now, mere association with another person --
12 and I think I have said this already -- does not make one
13 a co-conspirator. Just as mere association does not make
14 one a co-conspirator, neither does mere knowledge of a
15 prospective conspiracy or of the plans of the conspiracy
16 without participation make one a conspirator.

17 Mere similarity of conduct between two
18 persons and the fact that they have associated with each
19 other, that they assembled together and discussed common
20 aims and interests, none of them necessarily establish
21 proof of the existence of a conspiracy. You should not you
22 you must not find membership in a conspiracy merely because
23 of friendship between the people who are alleged to be
24 conspirators.

25 Mere association, even coupled with knowledge

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2 of the prospective conspiracy, is not enough. There must
3 be an affirmative finding by this jury that the defendant
4 that you are considering participated in the con-
5 spiracy.

6 Guilt, as I have said before, is personal
7 and individual. One does not become a member of a
8 conspiracy by rendering services to another. Acts done
9 innocently, though tending to further the purpose of a
10 proposed or prospective conspiracy, will not and of them-
11 selves bring the conspiracy into existence or render the
12 actor a co-conspirator. There must be wilful participation
13 with an intent to further the common purpose or design.

14 What is necessary for you to find that
15 the defendant you are considering was a member of the con-
16 spiracy alleged in Count 1 and the conspiracy alleged in
17 Count 3 is that the defendant participated with knowledge
18 of at least some of the purposes of the conspiracy and
19 with the intent to aid in the accomplishment of those pur-
20 poses.

21 In short, a person becomes a member of a
22 conspiracy by associating himself, even though informally,
23 with a common plan or scheme, knowing the central aim and
24 purpose and attempting to aid and bring about the
25 success of the plan or scheme.

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2 If you find with respect to the conspiracy
3 alleged in Count 1, that is, the conspiracy to kidnap
4 Buster Huggins -- if you find that either of the
5 defendants did not become a knowing and wilful member
6 of the conspiracy, then there was no conspiratorial
7 agreement and no conspiracy, and you must acquit both
8 of the defendants on Count 1.

9 Similarly, if you find with respect to the
10 conspiracy alleged in Count 3 -- this was the conspiracy
11 to extort a ransom through the use of interstate commerce
12 facilities -- if you find with respect to the conspiracy
13 alleged in Count 3 that either of the defendants did not
14 become a knowing and wilful member of the conspiracy,
15 then there was no conspiratorial agreement, there is no
16 conspiracy, and you must acquit both defendants on Count
17 3.

18 Now, let us assume that you do find that the
19 alleged conspiracy in either Count 1 or Count 3 or both
20 existed and that the defendants were members of that
21 conspiracy. There is still a third element which must
22 be found beyond a reasonable doubt, that is, the commission
23 of an overt act in furtherance of the conspiracy, to
24 effect the objects of the conspiracy.

25 Now, what is an overt act? It is a term of

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2 art in the law. "Overt act" is a term that appears
3 in the statute, and the years have given it a meaning.
4 It is not something that we use in daily conversation.
5

6 An overt act is simply some step, action
7 or conduct which is taken to achieve, accomplish or
8 further an objective of the conspiracy. It is an
9 essential element of the crime of conspiracy, because
10 the overt act establishes that the conspiracy is more
11 than mere talk.

12 Proof of an overt act is required, because
13 it is in recognition of the fact that parties might
14 agree to violate the law; they might also change their
15 minds and do nothing to put their agreement into effect.
16 In that event, there would be no crime of conspiracy.
17 There must be an overt act in furtherance of the con-
18 spiracy performed by one of the conspirators, or there
19 is no crime.

20 Now, the overt act need not be a criminal act.
21 It need not be done by a defendant that you are con-
22 sidering.

23 In the situation we are considering -- the
24 alleged conspiracies under Count 1 and Count 3 -- each
25 conspiracy which is alleged alleges two conspirators:
the two defendants in this case.

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2 I have said that you should consider -- you
3 must consider these defendants independently and in-
4 dividually in considering whether or not they are
5 guilty, but the overt act not only need not be a
6 criminal act; it need not be done by the defendant
7 you are considering. It must be done by one of the
8 two defendants, because they are the only conspirators.
9 It must be done by a conspirator.

10 An overt act by somebody who is not a member
11 of the conspiracy would not fulfill the requirement
12 of law that the overt act be done by a member of the
13 conspiracy in furtherance of some object or purpose of the
14 conspiracy.

15 Now, acts or statements of one alleged
16 conspirator may be considered as evidence against his
17 alleged co-conspirator but only if you find that the
18 statements, the acts were spoken and done during the
19 continuance of the conspiracy and in furtherance of the
20 conspiracy.

21 An act done by one of the conspirators in
22 furtherance of the conspiracy becomes an act of both
23 conspirators.

24 Now, the government in this case contends that
25 various overt acts were committed with respect to both

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2 the conspiracy alleged in Count 1 and the conspiracy
3 alleged in Count 3.

4 Under Count 1, the conspiracy to kidnap,
5 the indictment alleges the following overt acts:

6 1. On December 1, 1976, Burnell and Moore
7 kidnapped Henry Huggins in New York City.

8 2. On December 1, 1976, Burnell and Moore
9 caused Henry Huggins to speak by telephone from a public
10 telephone in New York with Huggins' parents in South
11 Carolina.

12 3. On or about December 3, 1976, Burnell
13 had a telephone conversation with a person in the Bronx
14 and demanded the payment of ransom for the release of
15 Henry Huggins.

16 4. On December 3, 1976, Moore had a telephone
17 conversation with a person in the Bronx and demanded
18 the payment of ransom for the release of Henry Huggins.

19 5. On or about December 4, 1976, Harold
20 Burnell had a telephone conversation with a person in
21 the Bronx, arranging for the payment of ransom for the
22 release of Henry Huggins.

23 6. On or about December 4, 1976, Moore had
24 a telephone conversation with another person in the Bronx,
25 arranging for the payment of ransom for the release of

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2 Henry Huggins.

3 7. On December 4, 1976, Harold Burnell and
4 Moore were in a car located at the Korvette's Shopping
5 Center on White Plains Road in the Bronx, New York.

6 Now, those are the overt acts which are
7 alleged by the government under the first conspiracy
8 count in the indictment, which is the kidnapping con-
9 spiracy.

10 Under Count 3, which is the conspiracy to
11 demand or extort a ransom by the use of the telephone
12 interstate, there is an allegation that repeats the seven
13 overt acts under Count 1 and adds an additional overt
14 act:

15 On or about December 1, 1976, Harold Burnell
16 and Moore placed a telephone call from New York to South
17 Carolina.

18 Those are the overt acts that are alleged.

19 It is not necessary for the government to
20 prove that both conspirators or the defendant at any
21 particular time that you are considering in particular
22 participated in any particular act, since the act of anyone
23 done in furtherance of the conspiracy becomes the act of
24 the other party.

25 The government is not required to prove each

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2 of the overt acts it alleges in the indictment. It is
3 sufficient that the government proves the commission
4 of at least one of the acts in the Southern District of
5 New York, at or about the time alleged. It need not
6 have occurred at the precise time or place that the
7 indictment says it was committed.

8 A conspiracy once formed is presumed to con-
9 tinue either until its objective is accomplished or
10 until there is some affirmative act of termination by
11 its members.

12 A conspiracy is not ended so long as the
13 evidence shows an intention to continue. Such intention
14 may be inferred by you from activities of the conspirators
15 in furtherance of the unlawful purposes of the conspiracy.

16 It is also presumed that once a person is
17 found to be a member of a conspiracy, he continues his
18 membership until its termination or until there is
19 affirmative proof of withdrawal or disassociation.

20 It is not essential that the government prove
21 that the conspiracy started and ended on or about the
22 specific dates alleged in the indictment. It is sufficient
23 if you find in fact that a conspiracy was formed and
24 existed for some time within the period set forth in
25 the indictment and that at least one of the overt acts

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2 was committed in furtherance of the conspiracy during
3 that period.

4 Now, if you find that the conspiracy charged
5 in Count 1 of the indictment or the conspiracy charged
6 in Count 3 of the indictment existed and that the
7 defendant you are considering was a member and that either
8 one of the defendants committed an overt act alleged
9 in the indictment and that the act was committed in
10 furtherance of some object of the conspiracy, some
11 purpose of the conspiracy, if you find, in short, that
12 all of the elements of conspiracy have been established
13 beyond a reasonable doubt, then the offense of conspiracy
14 is complete, and you should find the defendants guilty
15 under the conspiracy count that you are considering.
16 But if you find with respect to either conspiracy count,
17 Count 1 or Count 3, that any one of the three elements
18 of the crime has not been proven beyond a reasonable doubt
19 in the context of this case, you must acquit both defendants
20 on the conspiracy count you are considering.

21 Let me make this more specific.

22 If you do not find that the existence of the
23 conspiracy in either count has been proven beyond a
24 reasonable doubt or if you do not find beyond a reasonable
25 doubt that both defendants knowingly and wilfully associated

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2 themselves with the conspiracy or if you do not find beyond
3 a reasonable doubt that one of the conspirators com-
4 mitted in the Southern District of New York an overt act
5 in furtherance of the conspiracy and to effect the objects
6 of the conspiracy, then you must acquit both defendants
7 of the charge of conspiracy on the count that you are
8 considering.

9 Now, the second count alleged in the indict-
10 ment reads as follows:

3 11 On about December 1, 1976, in the Southern
12 District of New York, Burnell and Moore unlawfully and
13 knowingly kidnapped, did kidnap and carry away and hold
14 for ransom and reward and otherwise Henry Huggins and
15 did wilfully transport said person in interstate
16 commerce.

17 Thus, the second count charges that defendants
18 Harold Burnell and Vankirk Moore violated the law against
19 kidnapping. That law provides in part as follows --
20 and I am reading selectively from the law:

21 Whoever unlawfully kidnaps, carries away
22 and holds for ransom or otherwise any person when the
23 person is wilfully transported in interstate or foreign
24 commerce is guilty of a crime.

25 That statute, which is the underlying statute

1 mpp 72

2 that it is alleged in Count 2 was violated, is also
3 the underlying law that the defendants are charged with
4 conspiring to violate under the first conspiracy count.

5 I shall now delineate the elements.

6 Every crime has elements, and each of the
7 elements of every crime must be proved beyond a reasonable
8 doubt before a defendant can be found guilty.

9 I shall now delineate the elements of the
10 crime charged in Count 2.

11 The first element is that you must find beyond
12 a reasonable doubt that on or about December 1st the
13 defendants unlawfully kidnapped and carried away Henry
14 Huggins, that they did it without his consent or that they
15 aided and abetted each other in doing it.

16 Now, I will discuss aiding and abetting a
17 little later. That is the first element.

18 The second element is that in doing this,
19 in unlawfully kidnapping Buster Huggins, one or both
20 of the defendants transported or aided and abetted the
21 transportation of Henry Huggins in interstate or foreign
22 commerce.

23 The third element is that the defendants held
24 Henry Huggins for ransom, reward or otherwise.

25 The fourth element is that each of the

1 mpp 73

2 defendants did those acts knowingly and wilfully.

3 Let us just look at the first element for a
4 minute.

5 The first element: they are alleged to
6 have unlawfully kidnapped or carried away Henry Huggins
7 or aided and abetted each other in that endeavor.

8 Now, "kidnap" means to take and carry a person
9 away by force or against his will. "Carry away" denotes
10 the carrying or carrying away or holding of a person by
11 force and without that person's consent.

12 Thus, under this first element you must find
13 beyond a reasonable doubt that the defendants unlawfully
14 took and carried away or held Buster Huggins by force
15 without his consent and against his will.

16 The second element is that one or both of
17 the defendants transported Mr. Huggins in interstate or
18 foreign commerce. It is sufficient on this element that
19 you find beyond a reasonable doubt that one or both of the
20 defendants transported Buster Huggins across State or
21 National lines. It is not necessary to prove that the
22 defendants knew that they were taking the victim across
23 the State or National lines or that they intended to take
24 him from one State to another or from one country to
25

mpp 74

2014

1 another. It is sufficient if the government proves
2 beyond a reasonable doubt that one or both of the
3 defendants wilfully and knowingly transported the
4 victim from one point to another and in so doing
5 crossed a State line or a National border.
6

7 Now, this transportation of the victim
8 across a State or National line is an essential element
9 of the crime alleged in Count 2, and it must be proved
10 by the government beyond a reasonable doubt.

11 Under the law, the failure to release a
12 kidnapping victim within 24 hours creates a presumption
13 that the victim has been transported in interstate or
14 foreign commerce, and you may so find. You are not
15 required to so find. This presumption is not conclusive,
16 and it may be refuted or disproved by contrary evidence,
17 and it may simply not be accepted by you as jurors.

18 In sum, you are to look at all the evidence
19 in this case, not only the presumption that I just men-
20 tioned to you but the entirety of the proof before you
21 and decide whether or not the government has proved beyond
22 a reasonable doubt that Buster Huggins was in fact
23 transported in interstate or foreign commerce.

24 If you conclude that the government has not
25 proved such transportation beyond a reasonable doubt, you

mpp 75

2015

1 must acquit the defendants on Count 2.

2 If you find that the government has met its
3 burden you should go on to consider the other elements
4 of Count 2.
5

6 The third element of Count 2 that you must
7 find beyond a reasonable doubt is that the defendants,
8 Burnell and Moore, held the victim for ransom, reward
9 or otherwise or aided and abetted each other in holding
10 the victim.

11 Under this element, it would be sufficient
12 if you found that the defendants held the victim at least
13 in part for pecuniary gain, but it is also sufficient
14 if you find beyond a reasonable doubt that the defendants
15 held the victim against his will in whole or in part
16 or for any other reason other than pecuniary gain.

17 The government contends that the evidence at
18 trial shows that the defendants held the victim for a share
19 of the \$250,000 ransom that was sought to be collected
20 from his family. If you find beyond a reasonable doubt
21 that the defendants held the victim either to collect
22 this ransom or for any other reason, this third element
23 of Count 2 would be satisfied.

24 The fourth element of this Count 2 is that the
25 conduct alleged, the kidnapping across State lines, the

mpp 76

2016

1 holding for ransom, was committed knowingly and wil-
2 fully. In order to convict under any count you must
3 find beyond a reasonable doubt that the offense alleged
4 was committed wilfully and knowingly. I have already
5 defined these terms in the context of the conspiracy
6 count.
7

8 An act is done knowingly if it is done
9 voluntarily, purposely and not because of mistake,
10 accident, mere negligence or for some other innocent
11 reason. An act is done wilfully if it is done knowingly
12 and deliberately.

13 To find that the acts were done wilfully,
14 it is not necessary to find in addition that the defendant
15 knew what he was doing. It is not necessary to find
16 that he knew that he was breaking the law.

17 That, in sum, is Count 2.

18 Let us take a look at Count 4.

19 Count 4 reads in substance as follows:

20 On or about the 1st day of December, 1976,
21 in the Southern District of New York, Burnell and Moore
22 unlawfully, wilfully and knowingly did transmit in inter-
23 state commerce a communication, to wit, a telephone call
24 from New York to South Carolina containing a demand and
25 request for a ransom and reward for the release of a

mpp 77

2017

1 kidnapped person, Henry Huggins.

2
3 Count 4 charges violation of the law against
4 interstate transmission of ransom demands. That law
5 reads in part as follows:

6 Whoever transmits in interstate commerce any
7 communication containing any demand or request for a
8 ransom or reward for the release of any kidnapped
9 person is guilty of a crime.

10 Now, what are the elements of Count 4?

11 To find either of the defendants guilty on
12 Count 4, you must find each of the following elements
13 beyond a reasonable doubt:

14 First, that on or about December 1, 1976, in
15 the Southern District of New York, one or both of the
16 defendants made a telephone call from New York to South
17 Carolina or aided and abetted the other in making that
18 call.

19 Second, that this telephone call included
20 or contained a demand or request for a ransom or reward
21 for the release of a kidnapped person, Henry Huggins.

22 Third, that each of the defendants acted
23 wilfully and knowingly.

24 Now, I think that each of those elements is
25 self-explanatory. I don't think I will discuss them

mpp

2018

1 further. I have already discussed the meaning of "wilfully
2 and knowingly."
3

4 I would like, however, to talk for a minute
5 about these words which I used in this indictment,
6 "aiding and abetting."

7 With respect to both of the substantive counts,
8 Count 2 and Count 4, the defendants are charged with
9 aiding and abetting each other. This charge is based
10 on a Federal law which reads in part as follows:

11 'Whoever commits an offense against the
12 United States or aids or abets its commission is
13 punishable as a principal. Whoever wilfully causes an
14 act to be done which if directly performed by him
15 or another would be an offense against the United States
16 is punishable as a principal.

17 Now, under this statute the government is
18 not required to prove that both of the defendants per-
19 sonally fulfilled every element or act of the crimes
20 charged in Counts 2 and 4, the two substantive, kid-
21 napping count and interstate communication of an extortion
22 demand count. The government is not required to prove
23 that both of the defendants personally fulfilled every
24 element or act of those crimes so long as all elements
25 of each crime were established as to both defendants beyond

mpp

a reasonable doubt and it was established beyond a reasonable doubt that one was aiding and abetting the other.

Any person who purposely commits a crime that a statute forbids or that a statute declares to be a crime himself commits a crime. It is also a crime under this aiding and abetting statute to aid or abet or procure or induce another person to perform an act which would be a crime under this statute.

This statute therefore provides that anyone who aids or abets another one in committing an offense is just as guilty of that offense as if he had committed it himself.

Accordingly, you may find a defendant guilty of the offense charged in either Count 2 or Count 4 of this indictment if you find beyond a reasonable doubt that the other defendant committed the offense charged and that the defendant under your consideration aided and abetted the other defendant in committing that crime.

To find that a defendant aided or abetted another person -- in this case, the other defendant -- to commit the offense charged in any particular count, you must find that the defendant you are considering in some way associated himself with the criminal venture

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2020

1 charged in that count, that he participated in the venture
2 as something that he wished to bring about and that by
3 his act or acts he endeavored to make it succeed.
4

5 If he did, then he is an aider and abetter.

6 Participation by a defendant in a criminal
7 venture may be shown by any act designed to promote or
8 further the criminal venture, even if the act is of
9 relatively slight importance, which you find by the
10 defendant you are considering.. But to find a defendant
11 guilty of aiding and abetting you must find something
12 more than mere knowledge on his part that the crime
13 was being committed.

14 A mere spectator at a crime is not a participant
15 It is not necessary, however, to find that he personally
16 did any of the criminal acts, since participation in the
17 crime can be proved, just as an example, if it can be
18 shown that he aided or counselled another to commit the
19 crime.

20 In determining whether or not a defendant
21 participated in a criminal venture you may consider whether
22 that defendant had any stake in the venture or any motive
23 to aid in the venture.

24 Ladies and gentlemen of the jury, if you find
25 a reasonable doubt that one or both of the defendants has

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2021

1 committed one or any or all of the offenses charged here,
2 you should not hesitate to acquit him either on that
3 count or, if it is any other count, on all of the counts.
4 On the other hand, if you find beyond a reasonable doubt
5 that the law has been violated, you should not hesitate
6 to render a verdict of guilty.
7

8 When you first came into this case -- and it
9 seems a long time ago now -- you took oaths as jurors.
10 I think that everyone connected with this case has been
11 impressed and grateful at the attention that this jury
12 has paid during the course of this trial.

13 We have reached the stage now, or we will in
14 a few minutes reach the stage where the burden of this
15 matter falls directly on your shoulders.

16 When you first started in this case you took
17 oaths as jurors. Those oaths were very important oaths
18 and very serious oaths. The thrust of the oath that you
19 took was that you would consider the evidence and you
20 would render a fair and impartial verdict without fear
21 or favor.

22 It is an awesome responsibility, and I think
23 all counsel emphasized this. It is perhaps service of the
24 highest duty that a citizen can perform, because the
25 jury system is a very, very basic part of our entire

mpp

2022

1 democratic process. We do have a vigor and a vitality
2 in our democracy because we have such faith in the
3 capacity of our peers to sit on a case, to receive the
4 evidence, to sift that evidence and then to render a fair
5 and impartial verdict. It is a tradition that goes
6 back seven or eight hundred years, perhaps more than that,
7 and it goes back 300 years in this country. It goes back
8 a hundred years, at least, before the Revolution and
9 before the adoption of the Constitution.
10

11 The history of the common law jury system is
12 embedded in our ancient, ancient past, and it is as
13 vigorous today as it has ever been, and it remains that
14 way only because whenever juries are called upon to render
15 fair verdicts, they do render fair verdicts.

16 Now, under your oaths you agreed that you
17 would not be swayed by sympathy or by prejudice. You are
18 to be guided -- I think this is something which I have
19 emphasized throughout the case -- by the evidence in the
20 case, and the essential question that you have to ask
21 yourselves as you sift through this evidence is:
22 where is the truth?

23 The only triumph in any criminal case --
24 and I think this is probably true of civil cases as well --
25 the only triumph in any case is whether or not the truth

mpp

2023

has been found. If the truth has been found and if that truth is then stated by the jury, then justice is done.

So the jury, in any case, certainly in any criminal case, and you as the jury in this case, hold justice by a gossamer thread. What you do determines whether, so far as this case is concerned, there is justice or there is no justice. It is an awesome responsibility. It is a responsibility that I have every confidence that the jury will discharge well.

I have said before but I do want to say it again: the charges in this case are very serious, and a just determination in the case is important to the government and the public, and it is equally important to the defendants.

You as jurors have taken an oath to decide the case on the facts without fear, without favor and in accordance with the law and the evidence as I have set forth the law to you. If the government has failed to carry its burden as to either of the defendants on any or all of the counts, your sworn duty is to bring in a verdict of not guilty. If the government has carried its burden and has proved either defendant or both defendants guilty beyond a reasonable doubt on any count or on all counts, it is your sworn duty to state that

1 mpp

2 verdict.

3 Your function now is to weigh the evidence
4 and to determine with respect to each defendant with
5 respect to each count whether he is guilty or not
6 guilty.

7 Your verdict with respect to each defendant
8 on each count must be based solely on the evidence and
9 on the instructions that I have given you.

10 The verdict you do return must represent the
11 considered judgment of every juror. The verdict that
12 you do return must be agreed to by each and every juror.
13 It must be a unanimous verdict.

14 It will be your duty as jurors to consult
15 with one another, to deliberate. For three weeks, perhaps
16 more, I have been instructing you that you should not
17 discuss this case with anyone, that you should not discuss
18 it with anyone outside this courtroom and you should not
19 discuss it with one another. However, when you retire
20 to deliberate, that instruction is lifted, and now the
21 instruction is that once this case is submitted to you,
22 you should, you must discuss it with one another.

23 We will, when we submit this case to the jury,
24 excuse the alternate jurors, and there will be 12 jurors.
25 Each one of these 12 jurors comes from a different back-

mpp

ground and is going to bring to the deliberations here a different knowledge, a different experience, a different quality of assessing and evaluating and remembering evidence.

Exchange among those 12 people, each with this different background, is an invaluable way of arriving at the truth.

You must approach this discussion -- and it must be a full discussion and an open discussion and a reasoned discussion -- but you must approach it with an open mind. Be prepared to give your views, but be prepared to listen to the views of your fellows.

This is a system which has worked, as I said before, for eight hundred or a thousand years. It is the finest system that man has yet devised to arrive at the truth and at justice.

You must listen to one another. When you think you are right, attempt to persuade the other person, but certainly keep your mind open to his views.

Please remember at all times during your consideration of this matter that you are not partisans. You are judges. You are the judges of the facts. I am called the Judge in this court, but so far as determining the facts in this case I have no function.

mpp

1
2 That is your function, and that is the important function
3 in this case.

4 Now, I think what we will do so far as
5 procedure from hereon in is concerned, is that I will
6 ask the jury to retire for just a few minutes so that
7 I can speak to counsel, and I hope that counsel will
8 have some suggestions to make as to the charge or further
9 charges which should be given or changes in charges which
10 I should make. So I will ask you at this stage that you
11 still not discuss the case with one another and just retire
12 for a few minutes, and then we will call you back, and
13 then we will recess for the night, and your deliberations
14 will begin in the morning.

15 So for the present you are still under the
16 restriction: do not discuss the case with one another.
17 You will be released fairly soon.

18 (The jury left the courtroom.)

19 MR. HOCHHEISER: Would the Court wish to
20 handle this business in the defendants' absence?
21 We would waive their presence.

22 THE COURT: No. I would prefer to have them
23 here.

24 MR. HOCHHEISER: In that case, may I make
25 another phone call, while we wait?

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2040

ment is going to underscore that to the point where it may be the only thing that they remember about the charge.

I recognize that conspiracy instructions in general are extremely difficult under the best of circumstances.

MR. THAU: Your Honor, may I add a correction? I am sorry. I had fixed my watch for summation purposes, and when I stated the time at which the charged had started, I did not realize that I was 20 minutes behind the time, so I suppose it started at 5.15 or 5.20 or thereabouts, rather than as I stated it to be.

THE COURT: I think at this stage I will give the jury a corrective charge with respect to recollection and send them to the hotel for the night.

(Jury in box.)

THE COURT: Ladies and gentlemen of the jury, just one supplement to my charge:

I charged you earlier that you should not depend on the recollection of the attorneys in their summations. Please apply that same rule with full vigor to the charge which I gave you, so far as anything in it pertaining to facts in evidence is concerned.

So far that is concerned, your recollection and not mine is to control.

mpp

1
2 Counsel have pointed out to me a mistake that
3 I made with respect to the facts in the case. I am
4 not going to burden you with the substance of the
5 mistake, because I think the important thing for you
6 to remember is that it is your recollection and not
7 mine, not Mr. Kaplan's, not Mr. Thau's and not Mr.
8 Hochheiser's that controls.

9 At this stage, I am just about to submit the
10 case to the jury. I just want to add a couple of things.

11 I have said that your verdict should be a
12 unanimous verdict. You will receive during the course
13 of your deliberations any testimony which you want to
14 hear. We will make a copy of the indictment available
15 to you. You may see the various exhibits. It may be
16 that for some of them you will have to come into the
17 courtroom.

18 I just ask that when you send a request to
19 us -- and it must be through the foreman and in writing --
20 specify as closely as you can what it is you want.
21 We would not expect you to remember exhibit numbers,
22 but to the extent you can, if you want to see any
23 exhibits or hear any testimony, spell out what it is;
24 then it will take us some time to get it, so don't be
25 too impatient.

1 mpp
2 Your verdict is to be unanimous.

3 I do not want either myself or anyone else
4 to know at any stage during your deliberations how you
5 can stand with respect to the counts. If you want to
6 indicate to the Court anything, never let us know, never
7 let me know where the jury stands with respect to any one
8 of the counts. I don't want to know what the count is
9 in the jury at any particular time.

10 Is that understood?

11 You can send any messages you want to,
12 except never send us a message telling us that at this
13 time the jury stands so-and-so on such-and-such a count.

14 I think what we will do is this:

15 The alternate jurors will be excused, and the
16 marshal will be sworn, and then we will excuse the jury,
17 and just as soon as possible we will arrange for you to
18 be brought to your hotel, and you can commence delibera-
19 tions in the morning.

20 It may be that it will take a little time for
21 the marshal to get transportation arranged, so perhaps
22 you will have some time to deliberate this evening,
23 but I think it has been a very long day, and it seems to
24 me a much healthier thing for you to do to get to the
25 hotel as soon as possible and get dinner, and then you

1 mpp

2 will start your deliberations here at 9.30 tomorrow
3 morning.

4 To the alternate jurors, I say thank you
5 very much for staying with us and for your attention.

6 (The alternate jurors were excused.)

7 (The deputy marshal was duly sworn, and
8 at 8.30 p.m., the jury left the courtroom in his
9 custody.)

10 (Adjourned to March 11, 1977, at 9.30 a.m.)
11
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KAPLAN, A.U.S.A.

United States of America vs.

United States District Court for

DEFENDANT

SOUTHERN DISTRICT OF NEW YORK

HAROLD BURNELL

a k a MARION

DOCKET NO. 76 Cr. 1121 V.L.B.

JUDGMENT AND PROBATION COMMITMENT ORDER

In the presence of the attorney for the government
the defendant appeared in person on this dateMONTH DAY YEAR
APRIL 22 1977

COUNSEL

☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

ROLAND THAU ESQ.

(Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that
there is a factual basis for the plea,☐ NOLO CONTENDERE,☒ NOT GUILTY

There being a finding of verdict of

☐ NOT GUILTY. Defendant is discharged☒ GUILTY.FINDING &
JUDGMENT

Defendant has been convicted as charged of the offense(s) of unlawfully did kidnap and hold for ransom a person, and did transport said person in interstate commerce, and did transmit in interstate commerce a communication, to wit a telephone call, containing a demand and ransom for the release of a kidnaped person, and conspiracy so to do...

(Title 18, Section 1201 (c) 1201 (a) and 2, Section 371, Sections 875 (a) and 2.)

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

SENTENCE
OR
PROBATION
ORDER

TEN (10) YEARS, on count 1.

LIFE, on count 2.

FIVE (5) YEARS, on count 3

FIVE (5) YEARS on count 4

Sentence on each of counts 1, 2, 3 and 4 to run concurrently with each other.

SPECIAL
CONDITIONS
OF
PROBATIONADDITIONAL
CONDITIONS
OF
PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT
RECOMMEN-
DATION

The court orders commitment to the custody of the Attorney General and recommends, that defendant be confined at the Metropolitan Correctional Center, pending the determination of his appeal.

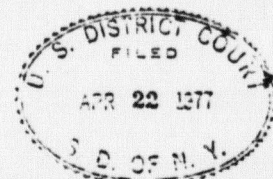
It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

☒ U.S. District Judge☐ U.S. Magistrate

VINCENT L. BRODERICK

Date APRIL 22, 1977



KAPLAN, A.U.S.A.

United States of America vs.

United States District Court for

DEFENDANT

SOUTHERN DISTRICT OF NEW YORK

VANKIRK MOORE

a/k/a Tico

DOCKET NO.

76 Cr. 1121 V.L.B.

JUDGMENT AND PROBATION/RECOMMENDATION ORDER

In the presence of the attorney for the government
the defendant appeared in person on this date

MONTH	DAY	YEAR
APRIL	22	1977

COUNSEL

☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

LAWRENCE HOCHHEISER, ESQ.

(Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that
there is a factual basis for the plea,☐ NOLO CONTENDERE.☒ NOT GUILTY

There being a finding/verdict of

☐ NOT GUILTY. Defendant is discharged☒ GUILTY.FINDING &
JUDGMENT

Defendant has been convicted as charged of the offense(s) of unlawfully did kidnap and hold for ransom a person, and did transport said person in interstate commerce, and did transmit in interstate commerce a communication, to wit a telephone call, containing a demand for ransom for the release of a kidnaped person, and conspiracy so to do.

(Title 18, Sections 1201 (c) 1201 (a) and 2, Section 371, Sections 875 (a) and 2.)

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty, as charged and convicted and ordered that The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

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PROBATIONADDITIONAL
CONDITIONS
OF
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COMMITMENT
RECOMMEN-
DATION

The court orders commitment to the custody of the Attorney General and recommends,

MICROFILM
APR 27 1977

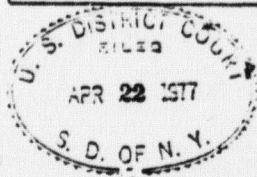
It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

☒ U.S. District Judge☐ U.S. Magistrate

VINCENT L. BRODERICK

Date APRIL 22, 1977



A320

Leave to prosecute appeal in
forma pauperis is hereby granted.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Docket Number

76 Cr. 1121

U.S. D.J.

- against -

Hon. Vincent J. Broderick

(District Court Judge)

HAROLD BURNELL,

defendant.

NOTICE OF APPEAL

Notice is hereby given that HAROLD BURNELL appeals tothe United States Court of Appeals for the Second Circuit from the ☒ Judgment ☐ order ☐ other(specify) of conviction entered in this action on April 22, 1977

(Date)

Date April 27, 1977

Address

To: Robert B. Fiske, Jr., Esq.,
United States Attorney(Counsel for Appellant)
William J. Gallagher, Federal
Defender Unit, Legal Aid Soc.

2 Lafayette St., NY, NY 10007

Phone Number

577-3415

ADD ADDITIONAL PAGE IF NECESSARY

(TO BE COMPLETED BY ATTORNEY)

TRANSCRIPT INFORMATION - FORM B



QUESTIONNAIRE



TRANSCRIPT ORDER

DESCRIPTION OF PROCEEDINGS
FOR WHICH TRANSCRIPT IS
REQUIRED (INCLUDE DATE).☐ I am ordering a transcript☐ I am not ordering a transcript

Reason:

☒ Daily copy is available☐ U.S. Attorney has placed order☐ Other. Attach explanation

Prepare transcript of

☐ Pre-trial proceedings☐ Trial☐ Sentence☐ Post-trial proceedingsThe ATTORNEY certifies that he will make satisfactory arrangements with the court reporter for payment of the cost of the transcript. (FRAP 10(b)) ▶ Method of payment ☐ Funds ☐ CJA Form 21

ATTORNEY'S signature

DATE

April 27, 1976

COURT REPORTER ACKNOWLEDGEMENT

To be completed by Court Reporter and
forwarded to Court of Appeals.

Date order received

Estimated completion date

Estimated number
of pages.

Date

Signature

(Court Reporter)

ORIGINAL

19

UNITED STATES DISTRICT COURT

S. D. N. Y.

U. S. A.

v.

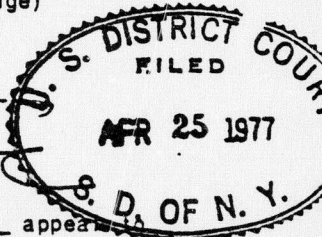
VAN KIRK MOORE

Docket Number

76 CR 1121

Vincent L. Brubaker

(District Court Judge)



NOTICE OF APPEAL

Notice is hereby given that

VAN KIRK MOORE

appeals

the United States Court of Appeals for the Second Circuit from the ☒ Judgment ☐ order ☐ other(specify) Conviction entered in this action on April 22, 1977

(Date)

Lawrence Horbini

(Counsel for Appellant)

Date

4-22-77

Address

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To:

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ADD ADDITIONAL PAGE IF NECESSARY

(TO BE COMPLETED BY ATTORNEY)

TRANSCRIPT INFORMATION - FORM B

▶ QUESTIONNAIRE

- ☒ I am ordering a transcript
☐ I am not ordering a transcript

Reason:

- ☒ Daily copy is available
☐ U.S. Attorney has placed order
☐ Other. Attach explanation

I do not have access to Sentence Minutes

▶ TRANSCRIPT ORDER

Prepare transcript of

- ☐ Pre-trial proceedings
☐ Trial
☒ Sentence
☐ Post-trial proceedings

DESCRIPTION OF PROCEEDINGS
FOR WHICH TRANSCRIPT IS
REQUIRED (INCLUDE DATE).The ATTORNEY certifies that he will make satisfactory arrangements with the court reporter for payment of the cost of the transcript. (FRAP 10(b)) ▶ Method of payment ☐ Funds ☐ CJA Form 21

ATTORNEY'S signature

Lawrence Horbini

DATE

4-22-77

▶ COURT REPORTER ACKNOWLEDGEMENT

To be completed by Court Reporter and
forwarded to Court of Appeals.

Date order received

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of pages.

Date

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(Court Reporter)

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